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Canada's Federal System

being a

Treatise on Canadian Constitutional Law under the British North America Act

BY

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PREFACE

I have endeavoured in this book to supply the reader with all the light upon Canada's federal system under the British North America Act, 1867, and supplemental Imperial and Dominion Acts, which is derivable from authoritative sources. Happily Canada's federal Constitution is a living system, so wisely devised that it is free to expand and develop in harmony with the national growth. Consequently all that any writer upon this great theme can hope to do is to faithfully describe the present aspect of a polity which is in constant process of healthy organic change and readjustment.

To describe this book as a second edition of the one published in 1898-9 under the name of The Law of Legislative Power in Canada, would be misleading. Although I have endeavoured to retain the principal features of that work, I have entirely re-written it, and greatly altered the arrangement. My main idea here has been first to set out, explain and illustrate all such general principles of construction of the provisions of the British North America Act as are derivable from the authorities, and then to discuss *seriatim* the various law-making powers of the Dominion parliament and the provincial legislatures in the light of those principles, concluding with a discussion of the provisions of the Act relating to the public property of the Dominion and the provinces respectively.

Canada has led the way in embodying the free principles of British government in a federal system. Nearly fifty years of experience have proved her Constitution an abounding success. Federation is in the air to-day; and the success of Canada's Constitution may make it worthy of study far beyond the boundaries of this Dominion.

A. H. F. Lefroy.

September 1st, 1913.

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[1] It is desired to call special attention here to two features of this book, namely, the note references to different passages appended to the copy of the British North America Act, 1867, printed in the Appendix of Statutes and Orders in Council, and the caption in the General Index—'Statutes, Validity or Invalidity of'—under which will be found a list of different kinds of statutes, Dominion and provincial, the constitutionality of which has been passed upon by the Courts, or otherwise authoritatively dealt with; also those of 'Dominion powers,' and 'Provincial powers.'

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TABLE OF ABBREVIATIONS[1]

A. R.	Ontario Court of Appeal reports: Toronto.
B. C.	British Columbia reports: Victoria.
B. C. Sess. pap.	British Columbia Sessional papers.
Bryce's Amer. Comm.	The American Commonwealth, by James Bryce: MacMillan & Co., 1888.
C. A.	New Zealand Court of Appeal reports.
Can. Com. Journ.	Canada Commons Journal.
Can. Hans.	Canadian Hansard, being official reports of the debates of the House of Commons of the Dominion of Canada; Queen's Printer, Ottawa.
Can. Sess. pap.	Sessional papers of the province of Canada.
Cart.	Mr. J. R. Cartwright's collection of cases decided on the British North America Act, 1867; Toronto, 5 vols.
Cass. Sup. Ct. Dig.	A digest of cases decided by the Supreme Court of Canada by Robert Cassels, Q.C.: Carswell & Co., Toronto, 1893.
C. L. J.	The Canada Law Journal: Toronto.
C. L. R.	Commonwealth (Australia) L. R.
C. L. T.	The Canadian Law Times: Toronto.
Con. Stat., N.B.	Consolidated Statutes of New Brunswick.
C. P.	Upper Canada Common Pleas Reports: Toronto.
Dall.	Reports of cases in the Courts of Pennsylvania, by A. J. Dallas, 1830-5.
Dom. Sess. pap.	Dominion Sessional papers: Queen's Printer, Ottawa.
Dor. Q. A.	Decisions of the Court of Appeal (Queen's Bench reports) Quebec, by L. C. W. Dorion: Montreal.
Dor. Q. B., Que.	Same as the last.
Ex. C. R.	Reports of the Exchequer Court of Canada: Ottawa.
Gr.	Reports of cases in the Court of Chancery of Upper Canada, and afterwards of Ontario, by Alexander Grant: Toronto.
Hannay	Reports of cases in the Supreme Court of New Brunswick, by James Hannay, 1870-5: Fredericton and St. John, N.B.
Haw. Rep.	Hawaiian reports: Honolulu.
Hodgins' Provincial. Legislation	Correspondence, reports of the Ministers of Justice, and Orders in Council, upon the subject of Dominion and Provincial Legislation, 1867-1895, by W. E. Hodgins, M.A., Ottawa, 1896.
J. R. N. S. S. C.	New Zealand Jurist reports, New Series, Supreme Court.
Knox (N. S. W.)	Cases in the Supreme Court of New South Wales, by George Knox, Sydney.
L. C. J.	The Lower Canada Jurist, being a collection of decisions of Lower Canada: Montreal.
L. N.	The Legal News: Montreal.

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[1] The reference to the English Law Reports and some few others are omitted from this table, as too well known to need explanation.

M. L. R. (Q. B.)	Montreal Law reports, Queen's Bench: Montreal.
M. L. R. (S.C.)	Montreal Law reports, Superior Court: Montreal.
M. R.	Manitoba reports: Winnipeg.
N. B.	New Brunswick reports.
N. S.	Nova Scotia reports.
N. S. W.	New South Wales reports.
N. W. T.	Reports of the Supreme Court of the North-West Territories.
O. A. R.	Ontario Court of Appeal reports: Toronto.
O. L. R.	Ontario Law Reports (Superior Courts, including provincial Court of Appeal).
Ont. Sess. pap.	Ontario Sessional papers: Toronto.
O. P. R.	Ontario Practice reports: Toronto.
O. R.	Reports of decisions in the High Court of Justice for Ontario: Toronto.
O. S.	Upper Canada Queen's Bench and Practice Courts reports, old series: Toronto.
O. W. N.	Ontario Weekly Notes.
P. & B.	Reports of cases in the Supreme Court of New Brunswick, by Wm. Pugsley and G. W. Burbidge.
P. E. I.	Prince Edward Island reports.
P. R.	Ontario Practice reports.
Pugs.	New Brunswick reports, by Wm. Pugsley.
Q. L. R.	The Quebec Law Reports.
R. & C.	Russell and Chesley's Nova Scotia reports.
Rev. Stats., N. S.	Revised Statutes of Nova Scotia.
R. & G.	Russell and Geldert's Nova Scotia reports.
R. J. Q. (S.C.)	Les Rapports Judiciaires Officiels de Quebec, Superior Bench: Montreal.
R. J. Q. (Q.B.)	Same (Queen's Bench).
R. L.	La Revue Legale: Montreal.
Russ. Eq.	Russell's Nova Scotia Equity decisions: Halifax.
S. C. R.	Supreme Courts of Canada reports: Ottawa.
Steph. Dig.	Stephen's Quebec Law Digest: Montreal.
Stuart	Stuart's Lower Canada reports.
Todd's Parl. Gov. in Brit. Col.	Parliamentary Government in the British Colonies by Alpheus Todd, LL.D., C.M.G., 2nd ed.; Longman Green & Co., London, 1894.
U. C. R.	Upper Canada Queen's Bench reports.
V. L. R.	Victoria (Australia) Law reports.
W. L. T.	The Western Law Times reports: Winnipeg.
W. N.	Ontario Weekly Notes.
W., W. and A'B.	Wyatt, Webb and A'Beckett's Victorian (Australian) reports.

ADDENDA[1]

To pp. 344-6; 350-353. Provincial legislation cannot validly confer upon a provincial railway company compulsory powers for the purpose of enabling it to construct its line across the line of a Dominion railway by way of level crossing, and to run its trains over the line when constructed. It cannot override, interfere with or control or affect, the crossing or right of crossing of a Dominion railway by a provincial railway.

Per Duff, J. (p. 38). "When you have an existing Dominion railway, all matters relating to the physical interference with the works of that railway or the management of the railway should be regarded as wholly withdrawn from provincial authority.

In re Alberta Railway Act (1913), 48 S. C. R. 9.

To pp. 170-2. And see *British Columbia Electric Railway Co.* v. *Vancouver, Victoria, and Eastern R. W. and Navigation Co.* (1913), 48 S. C. R. 98, from which leave to appeal to the Privy Council has been granted. See especially per Duff, J., *diss.* at pp. 114-5.

To pp. 166-177; 180-183; 364-371; 445-461. See *British Columbia Electric Railway Co.* v. *Vancouver, Victoria, and Eastern R. W. and Navigation Co., supra,* per Duff, J., *diss.* at pp. 115-134.

To p. 104, n. In *Gavin Gibson & Co.* v. *Gibson,* [1913] W. N. 246, Atkin, J. 'declined to accept the proposition that a person in a British colony became a subject of that colony so that a judgment of its Courts obtained in his absence was binding upon him in all other Courts.'

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[1] The cases here noted were reported after this book was through the press.

LEADING CONSTITUTIONAL PROPOSITIONS

PAGE

1. The British North America Act is the sole charter by which the rights claimed by the Dominion and the provinces respectively can be determined . 14-16

2. Although the British North America Act was founded upon the Quebec Resolutions, and so must be accepted as embodying a treaty of union between the provinces, yet, when once enacted it constituted a wholly new point of departure, and established the Dominion and provincial governments with definite powers and duties both alike derived from it as their source. 14-16

3. The state of legislation and the legislative powers exercised in the various provinces prior to Confederation can at most only be usefully referred to to throw light upon the language of the Imperial Act when that language is doubtful, as may also the course and character of legislation in England itself. - 15-16

4. In estimating the relation of Canadian legislation to the provisions of the British North America Act relating to the distribution of legislative power, it is proper to remember that some points of views may be more nat-

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ural to a young and growing community interested in developing the resources of a vast territory as yet not fully settled than they could possibly be in the narrow and thickly populated area of such a country as England, and generally to bear in mind the actual conditions of Canada. 19; 177-8

5. No consent or acquiescence of the Crown in the form of non-exercise of the veto power, or otherwise, can render valid an Act otherwise *ultra vires* and unconstitutional under the British North America Act. 17

6. The British North America Act although upon it is established the Constitution of a vast Dominion is, after all, a statute, and Courts of law must treat its provisions by the same methods of construction and exposition which they apply to other statutes, no matter how great the constitutional importance of questions which may be raised. But a liberal construction must be given to it as a constitutional statute conferring and distributing high and large powers of government, both as to Canada and its provinces. 17-19

7. The prerogative of the Crown runs in Canada to the same extent as in England, and when it has not been expressly limited by Imperial statute, or

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by valid local law or statute, is as extensive in His Majesty's over-seas Dominions as in Great Britain. For the purpose of entitling itself to the benefit of its prerogative rights the Crown is to be considered as one and indivisible throughout the Empire. 21-23

8. The Crown is a party to and bound by both Dominion and provincial statutes so far as such statutes are *intra vires,* that is, relate to matters placed within the Dominion or provincial control respectively by the British North America Act. 23

9. A gift of legislative power carries with it a corresponding executive power, even where such executive power is of a prerogative character, unless there be some restraining enactment. 24-25

10. The Lieutenant-Governors of provinces, when appointed, are as much the representatives of His Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion Government. 25-29

11. The British North America Act makes an elaborate distribution of the whole field of legislative authority respecting the internal affairs of the Dominion between two legislative bodies, and at the same time provides for the

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federated provinces a carefully balanced Constitution under which no one of the parts can pass laws for itself except under the control of the whole, acting through the Governor-General . 188

12. The possession by the Federal Government of the veto power over provincial legislation is one of those special features of the Constitution of the Dominion which distinguishes it from the Constitution of the United States of America. 30-44

13. The powers of legislation conferred upon the Dominion parliament and the provincial legislatures respectively by the British North America Act, are conferred subject to the sovereign authority of the Imperial parliament. 51-58

14. With respect to those matters over which legislative authority has been conferred by the British North America Act upon the Dominion parliament and the provincial legislatures respectively, the powers of legislation given are plenary and as large, and of the same nature, as those of the Imperial parliament itself. If it be once determined that the Dominion parliament or a provincial legislature has passed an Act upon any subject which is within its jurisdiction to legislate upon, its

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jurisdiction as to the terms of such legislation is as absolute as that of the Imperial parliament in the United Kingdom over a like subject. Neither the Dominion parliament nor the provincial legislatures are in any sense delegates of, or acting under any mandate from, the Imperial parliament. 64-74

15. Canadian legislatures have the same power which the Imperial parliament would have under the like circumstances to confide to a municipal institution or body of their own creation authority to make by-laws or regulations as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect, and, also, power to legislate conditionally, as, for instance, by enacting that an Act shall come into operation only on the petition of a majority of electors. 63-73

16. If the Dominion parliament or a provincial legislature legislates strictly within the powers conferred in relation to matters over which the British North America Act gives them exclusive legislative control, Courts have no right to enquire what motive induced them to exercise their powers. 75-6

17. The parliament of Canada cannot under colour of general legislation

deal with what are provincial matters only, and conversely provincial legislatures cannot under the mere pretence of legislating upon one of the matters enumerated in section 92, really legislate upon a matter assigned to the jurisdiction of the parliament of Canada. 76-81

18. If the Dominion parliament or the provincial legislatures have no power to legislate directly upon a given subject matter, neither may they do so indirectly. 81-82

19. It is not competent for any Court when once an Act is passed by either the Dominion parliament or a provincial legislature in respect to any matter over which it has jurisdiction to legislate, to pronounce the Act invalid because it may affect injuriously private rights, any more than it would be competent for the Courts in England for the like reason to refuse to give effect to a like Act of the parliament of the United Kingdom. 82-85

20. The framers of the British North America Act in providing for the distribution of legislative power within Canada were careful to use only very general language containing in principle the conferred powers, but leaving to future legislation and judicial interpretation the task of completing the details. 86-89

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21. The scheme of the British North America Act, comprises a fourfold classification of legislative powers, firstly, over those subjects which are assigned to the exclusive plenary power of the Dominion parliament, secondly, over those assigned exclusively to the provincial legislatures, thirdly, over two subjects, and two subjects only, which are assigned concurrently to the Dominion parliament and the provincial legislatures, namely, agriculture and immigration, and fourthly, over a particular subject which for special reasons is dealt with exceptionally and made the subject of special legislation. By section 91 the Imperial parliament unequivocally, but in general terms, declares its intention to be to place under the jurisdiction of the Dominion parliament all matters excepting only certain particular matters assigned by the Act to the local legislatures. 89-91

22. The great importance of that feature of the British North America Act whereby a general undefined and unrestricted power to make laws for the peace, order, and good government of Canada in relation to non-provincial subjects is vested in the Dominion parliament is obvious. 91-94

23. Whatever belongs to self-government in Canada belongs either to

the Dominion or to the provinces within the limits of the British North America Act. So far as the internal affairs of Canada are concerned whatever is not given to the provincial legislatures rests with the Dominion parliament. 94-96; 121

24. If the subject-matter of an Act is not within the jurisdiction of the provincial legislatures, acting either severally or in concert with each other, it is within the jurisdiction of the Dominion parliament, while on the other hand if the subject-matter of an Act, other than agriculture or immigration, is within the jurisdiction of the Dominion parliament, it is not (in its entirety) within the jurisdiction of the provincial legislatures, whether acting severally or in concert with each other, although some of the provisions of such Act, ancillary to the main subject of legislation, may be within such provincial jurisdiction. 96-99

25. The exercise of legislative power by the parliament of Canada in regard to all matters not enumerated in section 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to touch upon provincial legislation with respect to any classes of subjects enumerated in section 92. 99-100

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26. It is true, as a general statement, that the Dominion parliament cannot legislate except for Dominion territory, but this does not affect the power of the Imperial parliament to give the legislatures of self-governing Dominions within the Empire, the power to pass statutes which shall operate outside their borders, though within those of the Empire itself. 101-103

27. As the expressed intention of the British North America Act was to confer upon the Dominion a Constitution similar in principle to that of the United Kingdom, the Dominion parliament probably has the same power to bind British subjects domiciled in Canada everywhere as the Imperial parliament has to bind British subjects in general everywhere. 103-106

28. With the exception of agriculture and immigration (legislation in relation to which is specially provided for by section 95 of the British North America Act) there is no subject-matter over which there can (speaking strictly) be said to exist concurrent powers of legislation in the Dominion parliament and the provincial legislatures. The powers of the Dominion parliament and of the provincial legislatures to deal directly and in their entirety, and as matter of separate and detached legislation

(as distinguished from provisions merely ancillary to the main subject of legislation) with the various classes of subjects enumerated in sections 91 and 92 are in each case special and exclusive. 107-111

29. In order to construe the general terms in which the classes of possible subjects of legislation in sections 91 and 92 of the British North America Act are described, both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited. For the British North America Act has to be construed as a whole and where some specific matter is mentioned as within the exclusive power of one body, Dominion parliament or provincial legislature, as the case may be, which but for that reference would fall within the more general description of a subject-matter confided to the other, the statute must be read as excepting it from that general description. 112-118; 215-6; 389

30. There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear, and in such a domain the two legisla-

tions meet, then the Dominion legislation must prevail. 118-120; 191

31. In determining the validity of a Dominion Act the first question to be determined is whether the Act falls within any of the classes of subjects enumerated in section 92 and assigned exclusively to the legislatures of the provinces. If it does then the further question will arise whether the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and so does not still belong to the Dominion parliament. But if the Act does not fall within any of the classes of subjects in section 92 no further question will remain. 120-122

32. In determining the validity of a provincial Act, the first question to be decided is whether the Act impeached falls within any of the classes of subjects enumerated in section 92 of the British North America Act, and assigned exclusively to the legislatures of the provinces, for if it does not, it can be of no validity and no further question would then arise. It is only when an Act of the provincial legislature *prima facie* falls within one of these classes of subjects that the further question arises, namely, whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes

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of subjects in section 91, and so does not belong to the Dominion parliament. For, notwithstanding anything in the British North America Act, the exclusive authority of the parliament of Canada extends to all matters coming within the classes of subjects enumerated under the various items in section 91. 120-122

33. Where in respect to matters with which provincial legislatures have power to deal, provincial legislation directly conflicts with enactments of the Dominion parliament, whether the latter immediately relate to the enumerated classes of subjects in section 91 of the British North America Act, or are only ancillary to legislation on such subjects, or are enactments for the peace, order, and good government of Canada in relation to matters not coming within the classes of subjects assigned exclusively to the provincial legislatures, nor within the enumerated classes of section 91, the provincial legislation must yield to that of the Dominion parliament. 123-127

34. Before the laws enacted by the federal authority within the scope of its powers the provincial lines disappear. As to these laws we have a quasi-legislative union. They are the local

laws of the whole Dominion and of each and every province thereof. 123-127

35. In cases where parliament has legislated under its general power of legislation, as distinguished from its enumerated powers, there may be nothing to prevent a province legislating *in pari materia* to meet the special wants of that particular locality. 127

36. Notwithstanding anything in the British North America Act, the exclusive legislative authority of the parliament of Canada extends to all matters coming within the classes of subjects enumerated under the various items of section 91. 128-132

37. The principle of the 91st section of the British North America Act is to place within the legislative jurisdiction of the Dominion parliament general subjects which may be dealt with by legislation, as distinguished from subjects of a local or private nature in the province. 133-136

38. The powers of the Dominion parliament as defined in section 91 would seem to extend to such laws only as are for the peace, order, and good government of Canada. There does not fall under the concluding words of that section any legislation which cannot be pre-

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dicated as for the peace, order, and good government of Canada. 136-8; 169

39. Any matter coming within any of the classes of subjects enumerated in section 91 of the British North America Act shall not be deemed to come within any of the classes of subjects enumerated in section 92, and by that section assigned exclusively to the legislatures of the provinces; but this rule is not to be understood as derogating from the legislative authority given to provincial legislatures by section 92, save to the extent of enabling the parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incident to the exercise of the powers conferred upon it by the enumerated heads of section 91. 138-140; 168

40. In legislating for the peace, order, and good government of Canada in regard to matters not specified among the enumerated subjects of legislation in section 91, the Dominion parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures; neither, on the other hand, can provincial legislatures legislate on any of the enumerated matters in section 91 for their own provinces under the pretence,

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or contention, that the legislation is of a provincial or local character. 140-143

41. Notwithstanding Proposition 38, it would seem that if the subject-matter dealt with comes within the classes of subjects assigned to the parliament of Canada (or, if, though this be not the case, the law be one for the peace, order, and good government of Canada in relation to subjects assigned to the legislatures of the provinces) there is no restriction upon that Parliament to prevent it passing a law affecting one part of the Dominion and not another, if in its wisdom it thinks the legislation applicable to and desirable in one and not in the other. 144-147

42. The Dominion parliament can, in matters within its sphere, impose duties upon any subjects of the Dominion, whether they be officials of provincial Courts, other officials, or private citizens; and there is nothing in the British North America Act to raise a doubt about the power of the Dominion parliament to impose new duties upon the existing provincial Courts, or to give them new powers as to matters which do not come within the subjects assigned exclusively to the legislatures of the province. It may also, it would seem, deprive them of jurisdiction over such matters. So too, it would appear,

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in matters within their sphere, provincial legislatures can impose duties upon Dominion officials in certain cases. 148-150; 553-4.

43. There is not to be found one word in section 91 of the British North America Act, expressing or implying a right in the Dominion parliament to interfere with provincial executive authority, where acting, of course, under valid provincial Acts in connection with matters proper to exclusive provincial jurisdiction. 150; 197-8

44. The provincial legislatures have no law-making powers except the enumerated powers expressly given to them by the British North America Act. But, apart from law-making powers, provincial legislatures have, doubtless, by virtue of being legislative bodies at all, such powers and privileges as are necessarily inherent in and incident to such bodies; and, having them, may regulate their exercise by statute or standing rules, if they see fit so to do, as for example, the power to remove any obstruction offered to the deliberations or proper action of the legislative body during its sittings. 153-158

45. Co-equal and co-ordinate legislative powers in every particular were conferred by the British North America Act on the provinces. 159-160

46. The powers conferred by section 129 of the British North America Act upon the provincial legislatures of Ontario and Quebec, to repeal and alter the statutes of the old parliament of the province of Canada, are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act; and the power of the provincial legislature to destroy a law of the old province of Canada is measured by its capacity to reconstruct what it has destroyed. And in no case can an Act of the old province of Canada, applicable to the two provinces of Ontario and Quebec, be validly repealed by one of them unless the nature of the Act is such that it still remains in full vigour in the other. 161-163

47. An Act of the Dominion parliament is not affected in respect to its validity, by the fact that it interferes prejudically with the object and operation of provincial Acts, provided that it is not itself legislation upon or within one of the subjects assigned to the exclusive jurisdiction of the provincial legislature. It is true, *a fortiori,* that in assigning to the Dominion parliament legislative jurisdiction in respect to the general subjects of legislation enumerated in section 91, the Imperial parlia-

ment, by necessary implication, intended to confer on it legislative power to interfere with, deal with, and encroach upon, matters otherwise assigned to the provincial legislatures under section 92, so far as a general law relating to those subjects so assigned to it may affect them, as it may also do to the extent of such ancillary provisions as may be required to prevent the scheme of such a law from being defeated. 164-179

48. The power of the Dominion parliament to incidentally deal, by way of ancillary legislation, with matters which are under the jurisdiction of the provinces, does not extend any further than is reasonable to enable it to legislate on the general subjects committed to its jurisdiction by the British North America Act. 169-179

49. The provincial legislatures seem to have no similar power of intruding by way of ancillary legislation upon the area of the Dominion enumerated powers, though they may have to invade the potential, though unoccupied, area of the Dominion residuary power. And whatever powers provincial legislatures have as included, *ex vi termini,* within the enumerated classes in section 92, when properly understood, those powers they may exercise, although in so doing

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they may incidentally touch or affect something which might otherwise be held to come within the exclusive jurisdiction of the Dominion parliament under some of the enumerated classes of section 91. 180-3

50. If, on due construction of the British North America Act, a legislative power falls within section 92, it is not to be restricted or its existence denied because by some possibility it may be abused or may limit the range which otherwise would be open to the Dominion parliament. Whatever power falls within the legitimate meaning of the classes in section 92, is what the Imperial parliament intended to give; and to place a limit on it, because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties in the construction of the Federation Act. And the same, of course, is true *mutatis mutandis* of Dominion powers. 184-9; 193

51. The object of the British North America Act was neither to weld the provinces into one, nor to subordinate provincial Governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province

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retaining its independence and autonomy. 189

52. Although by virtue of the *non-obstante* clause of section 91 of the British North America Act, and the concluding clause of that section, the construction of the enumerated powers conferred upon the Dominion parliament may be said to over-ride the construction of section 92,—yet, when the validity of a provincial Act is in question, and it clearly appears to fall within one of the classes of subjects enumerated in section 92, the onus is on persons attacking its validity to show that it does also come with within one or more of the classes of subjects specially enumerated in section 91. 191-192

53. A provincial legislature is not incapacitated, from enacting a law otherwise within its proper competency merely because the Dominion parliament might under section 91 of the British North America Act, if it saw fit so to do, pass a general law which would embrace within its scope the subject-matter of the provincial Act. 193-196

54. Subjects which in one aspect and for one purpose fall within the jurisdiction of the provincial legislatures under section 92 of the British North America Act, may in another aspect and

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for another purpose, fall within the jurisdiction of the Dominion parliament under section 91. 199-209

55. The true nature and character of the legislation in the particular instance under discussion—its ground and design, and the primary matter dealt with—its object and scope, must always be determined in order to ascertain the class of subjects to which it really belongs, and any merely incidental effect it may have over other matters does not alter the character of the law. 210-213

56. If an Act of the parliament of Canada, the objects and scope of which is general, and within its proper competency to deal with, provides that it shall come into force in such localities only in which it shall be adopted in a certain prescribed manner, or, in other words, by local option, this conditional application of the Act does not convert it into legislation in relation to matters of a merely local or private nature which by No. 16 of section 92 of the British North America Act are within the exclusive control of the provincial legislatures. The manner of bringing such an Act into force does not alter its general and uniform character. 210-211

57. It is not to be presumed that the Dominion parliament has exceeded its

powers, unless upon grounds really of a serious character; and so, likewise, in respect to provincial statutes every possible presumption must be made in favour of their validity. 213-215

58. Declarations of the Dominion parliament are not, of course, conclusive upon the interpretation of the British North America Act; but when the proper construction of the language used in that Act to define the distribution of legislative power is doubtful, the interpretation put upon it by the Dominion parliament in its actual legislation may properly be considered. And the same applies *a fortiori* where the provincial legislatures have by their legislation shewn agreement in the views of the Dominion parliament as to their respective powers. So, too, the views acted upon by the great public Departments, as expressed in Imperial despatches, or otherwise, carry weight in the absence of judicial decision. 215-217

59. The Dominion parliament cannot either expressly or impliedly, take away from or give to, the provincial legislatures a power which the Imperial Act does or does not give them; and the same is the case, *mutatis mutandis,* with the provincial legislatures. 217

60. If the Dominion parliament does not possess a legislative power,

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neither the exercise, nor the continued exercise, of a power not belonging to it can confer it, or make its legislation binding. And the same is, of course, true of legislation of provincial legislatures. 217

61. Although part of an Act either of the Dominion parliament or of a provincial legislature may be *ultra vires* and therefore invalid, this will not invalidate the rest of the Act, if it appears that one part is separate in its operation from the other part, so that each is a separate declaration of the legislative will, and unless the object of the Act is such that it cannot be attained by a partial execution. 219-222

62. A transaction which is *ultra vires* of the parties to it can derive no support from an Act which is itself *ultra vires* of the legislature passing it; nor will the right of those affected by it to treat it as of no legal force or validity, be interfered with by such an Act. 222-223

63. The fact that legislative jurisdiction in respect of a particular subject matter is conferred on the Dominion parliament or provincial legislatures affords no evidence or presumption that any proprietary rights with respect to it were transferred by the Act to the Dominion or provinces respectively. The Dominion parliament has no power, by

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virtue of its legislative jurisdiction under section 91 of the British North America Act, to confer upon others proprietary rights where it possesses none itself, unless under such items of section 91 as necessarily imply the power to deal with property although not vested in the Crown as represented by the Dominion Government. 224-229

64. The mere fact that an Act of a provincial legislature may incidentally touch some of the classes of subjects enumerated in section 91 of the British North America Act, although, in fact, such subjects are foreign to the purposes of such Act, and not necessarily and directly involved in the legislation, does not make the Act really one within or upon that class of subjects. 273-274

65. The Dominion parliament can alone incorporate companies with powers to carry on business throughout the Dominion, and the business of companies so incorporated may have to do with property and civil rights, yet it cannot empower them to carry on business in any province otherwise than subject to and consistently with the laws of that province, (unless the business is such that power to make laws in relation to it is exclusively in the Dominion parliament, under one of the enumerated

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heads of section 91 of the British North America Act). 339-343; 371-373; 381

66. The fact that a company incorporated under an Act of the Dominion parliament with power to carry on its business throughout the Dominion, chooses to confine the exercise of its powers to one province cannot affect its status or capacity as a corporation, if the Act incorporating the company was originally within the legislative power of the Dominion parliament. 382

67. The provincial legislatures have general jurisdiction, and they alone have general jurisdiction, over property and civil rights in the province; but this is not to be understood, on the one hand, as meaning that they can legislate upon any one of the subjects assigned exclusively to the parliament of Canada by section 91; nor is it to be understood, on the other hand, as meaning that the parliament of Canada cannot incidentally affect property and civil rights by its legislation, so far as such power is implied in its power to legislate upon the subjects exclusively assigned to it by section 91, or so far as is required as ancillary to the power to legislate effectually, and completely, on such subjects; and as, on the one hand, the operation of Acts of the provincial legislatures respecting property and

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civil rights in the province, or other provincial subjects, may be interfered with by reason of the operation of Acts of the Dominion parliament, so, also, Dominion Acts may be interfered with by reason of the operation of Acts of the provincial legislatures, although Dominion legislation, whether on one of the enumerated classes in section 91, or by way of provisions properly ancillary to legislation on one of the said enumerated classes, will over-ride and place in abeyance, provincial legislation which directly conflicts with it. 488-491

70. A provincial legislature by virtue of No. 13 of section 92 of the British North America Act has power to make laws in relation to such 'property and civil rights' (within the meaning of that clause as restricted to allow scope for the due operation of the other provisions of the said Act) as have a local position within the province; but they have no such power in relation to property and civil rights having their local position in another province; and if, in any case, they cannot legislate in relation to the one, without at the same time legislating in relation to the other, that is a case beyond their powers of legislation altogether. 501-509

CANADA'S FEDERAL SYSTEM

BEING A

TREATISE ON CANADIAN CONSTITUTIONAL LAW UNDER
THE BRITISH NORTH AMERICA ACT.

CHAPTER I.

THE GENERAL SCHEME.

To mention the various parts of what may be called the skeleton framework of the Dominion Constitution is a matter of no great difficulty. Our real difficulty will commence when we set out to examine and portray, minutely and with accuracy, the flesh and nerves and sinews, as it were, with which that portion which has to do with the distribution of legislative power between the Dominion parliament and the provincial legislatures has been clothed by the decisions of the Courts, and by the communications which have passed between the provincial Governments and the Dominion Government, and the reports of the Dominion Minister of Justice to the Governor-General upon provincial legislation.

The constituent parts of the Dominion Constitution are to be found in the provisions of the British North America Act, 1867;[1] nor is it possible to state them better than in the words there used.

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[1] The British North America Act, 1867—30-31 Vict. c. 3—was signed by Her Majesty Queen Victoria on March 29th, 1867, and came into force on July 1st of the same year. The following

At the apex of our constitutional system stands His Majesty the King.

THE EXECUTIVE.

9. The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the (King).

2. The provisions of this Act referring to (His) Majesty the (King) extend also to the heirs and survivors of (His) Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

15. The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces of and in Canada, is hereby declared to continue and be vested in the (King).

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amending or supplemental British North America Acts have been since passed by the Imperial parliament: 1871, 34-35 Vict. c. 28, respecting the establishment of provinces in the Dominion of Canada; 1875, 38-39 Vict. c. 38, to remove certain doubts with respect to the powers of the Dominion parliament under section 18 of the Act of 1867, respecting the privileges, immunities, and powers of the Senate and House of Commons; 1886, 49-50 Vict. c. 35, respecting the representation in the parliament of Canada of territories which for the time being form part of the Dominion of Canada, but are not included in any province; and 1907, 7 Edw. VII., c. 11, superseding section 118 of the Act of 1867, relating to the annual grants of money to be paid by the Dominion to the several provinces. The numbers prefixed to certain clauses in the following statement of the constituent parts of the Dominion Constitution refer to and introduce sections of the British North America Act, 1867, which is the Act intended throughout this article when the expression 'the British North America Act' simply is used. See Appendix of Statutes and Orders in Council where all these statutes are printed in full.

Inasmuch, however, as His Majesty cannot at the present time, whatever the future may bring forth, preside in person over the Government of his Dominion of Canada, he commissions and instructs a Governor-General to represent him, who has a Council to aid and advise him. The Federation Act provides:—

11. There shall be a Council to aid and advise in the government of Canada, to be styled the (King's) Privy Council for Canada; and the persons who are to be members of that Council shall be, from time to time, chosen and summoned by the Governor-General and sworn in as Privy Councillors, and members thereof may be, from time to time, removed by the Governor-General.

THE LEGISLATURE.

17. There shall be one Parliament of Canada, consisting of the (King), an Upper House, styled the Senate, and the House of Commons.

20. There shall be a session of the Parliament of Canada once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.

THE SENATE.

21. The Senate shall, subject to the provisions of this Act, consist of seventy-two members who shall be styled Senators.[2]

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[2] The full strength of the Senate at the present time is 96 members: 24 from the maritime provinces; 24 from Quebec; 24 from Ontario; and 24 from the western provinces. See section 27.

24. The Governor-General shall, from time to time, in the (King's) name, by Instrument under the Great Seal of Canada, summon qualified persons to the Senate; and subject to the provisions of this Act, every person so summoned shall become and be a Member of the Senate and a Senator.

29. A Senator shall, subject to the provisions of this Act,[2a] hold his place in the Senate for life.

THE HOUSE OF COMMONS.

38. The Governor-General shall, from time to time, in the (King's) name, by Instrument under the Great Seal of Canada, summon and call together the House of Commons.

39. A Senator shall not be capable of being elected or of sitting or voting as a Member of the House of Commons.

48. The presence of at least 20 Members of the House of Commons shall be necessary to constitute a meeting of the House for the exercise of its powers; and for that purpose the Speaker shall be reckoned as a Member.

50. Every House of Commons shall continue for five years from the day of the return of the Writs for choosing the House (subject to be sooner dissolved by the Governor-General) and no longer.

[2a] Section 30 provides that a Senator may resign his place in the Senate; section 31 that under certain circumstances the place of a Senator shall become vacant.

51. On the completion of the census in the year 1871, and of each subsequent decennial census, the representation of the four provinces[3] shall be readjusted by such authority in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:

(1) Quebec shall have the fixed number of sixty-five Members:

(2) There shall be assigned to each of the other provinces such a number of Members as will bear the same proportion to the number of

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[3] The four provinces are, of course, Quebec, Ontario, New Brunswick and Nova Scotia. In 1870 the province of Manitoba was carved out of the North-West Territories by Dominion Act, 33 Vict. c. 3, confirmed by Imp. 34-35 Vict. c. 28, and made one of the provinces of Canada. British Columbia was admitted as a province of the Dominion by Order in Council of May 16th, 1871, and Prince Edward Island by Order in Council of June 26th, 1873. The province of Alberta was constituted in 1905 by Dominion Act, 4-5 Edw. VII. c. 30, and the province of Saskatchewan, also in 1905, by Dominion Act, 4-5 Edw. VII. c. 42, both under the authority of Imp. 34-35 Vict. c. 28, known as the British North America Act, 1871. The above Orders in Council admitting new provinces, as also the Dominion Acts establishing the provinces of Manitoba, Alberta, and Saskatchewan, all provide that the provisions of the British North America Act, 1867, shall, with some minor variations, in each case, not affecting the main features of the Constitution, be applicable to each of the said provinces "in the same way and to the like extent as they apply to the several provinces of Canada, and as if (each of the said provinces) had been one of the provinces originally united by the said Act. The Imperial Act, 49-50 Vict. c. 35, passed in 1886, gave the parliament of Canada power to provide representation in the Senate and House of Commons for any territories which for the time being form part of the Dominion of Canada, but are not included in any province thereof. As to the interpretation of section 51, see *Attorney-General for the Province of Prince Edward Island* v. *Attorney-General for the Dominion*, [1905] A. C. 37, reported below, 33 S. C. R. 475, 594, especially sub-sec. 4. Sub-secs. 3, 4, and 5 are not printed in the text. See Appendix of Statutes and Orders in Council.

its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained).

ROYAL ASSENT.

55. Where a Bill passed by the Houses of Parliament is presented to the Governor-General for the (King's) assent, he shall declare, according to his discretion, but subject to the provisions of this Act and to (His) Majesty's instructions, either that he assents thereto in the (King's) name, or that he withholds the (King's) assent or that he reserves the Bill for the signification of the (King's) pleasure.

56. Where the Governor-General assents to a Bill in the (King's) name, he shall by the first convenient opportunity send an authentic copy of the Act to one of (His) Majesty's Principal Secretaries of State, and if the (King) in Council within two years after receipt thereof by the Secretary of State thinks fit to disallow the Act, such disallowance (with a certificate of the Secretary of State of the day on which the Act was received by him) being signified by the Governor-General, by Speech or Message to each of the Houses of Parliament or by Proclamation, shall annul the Act from and after the day of such signification.[3a]

57. A Bill reserved for the signification of the (King's) pleasure shall not have any force unless and until within two years from the day

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[3a] See *infra*, pp. 33-4; 47.

on which it was presented to the Governor-General for the (King's) assent, the Governor-General signifies, by Speech or Message to each of the Houses of Parliament or by Proclamation, that it has received the assent of the (King) in Council.

PROVINCIAL CONSTITUTIONS.

58. For each Province there shall be an officer, styled the Lieutenant-Governor, appointed by the Governor-General in Council by Instrument under the Great Seal of Canada.

59. A Lieutenant-Governor shall hold office during the pleasure of the Governor-General; but any Lieutenant-Governor . . . shall not be removeable within five years from his appointment, except for cause assigned, which shall be communicated to him in writing within one month after the order for his removal is made . . .[4]

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[4] The case of Mr. Letellier de St. Just, who was dismissed in 1879 by the Dominion Government from the Lieutenant-Governorship of Quebec, shows that the discretion of the Canadian Ministry is absolute in the matter of dismissal. As to this case see Todd's Parliamentary Government in British Colonies, 2nd ed., p. 604; Com. Pap., 1878-9, vol. 51, pp. 148-152. In a despatch of the Secretary of State for the Colonies to the Governor-General of July 3rd, 1879 (Can. Sess. Pap., 1880, No. 18), in reference to this Letellier Case, he says: "It has been noticed that while under section 58 of the Act the appointment of a Lieutenant-Governor is to be made 'by the Governor-General in Council by instrument under the Great Seal of Canada,' section 59 provides that 'a Lieutenant-Governor shall hold office during the pleasure of the Governor-General,' and much stress has been laid upon the supposed intention of the legislature in thus varying the language of these sections. But it must be remembered that other powers, vested in a similar way in 'the Governor-General,' were clearly intended to be and in practice are exer-

63. The Executive Council of Ontario and of Quebec shall be composed of such persons as the Lieutenant-Governor from time to time thinks fit.

64. The Constitution of the Executive authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of the Act, continue as it exists at the Union, until altered under the authority of this Act.

69. There shall be a Legislature for Ontario, consisting of the Lieutenant-Governor and of one House, styled the Legislative Assembly of Ontario.

71. There shall be a Legislature for Quebec, consisting of the Lieutenant-Governor and of two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

72. The Legislative Council of Quebec shall be composed of twenty-four members to be appointed by the Lieutenant-Governor in the (King's) name by Instrument under the Great Seal of Quebec.

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cised by him, by and with the advice of his Ministers; and though the position of a Governor-General would entitle his views on such a subject as that now under consideration, to peculiar weight, yet Her Majesty's Government do not find anything in the circumstances which would justify him in departing in this instance, from the general rule, and declining to follow the decided and sustained opinion of his Ministers, who are responsible for the peace and good government of the whole Dominion to the Parliament to which, according to the 59th section of the statute, the cause assigned for the removal of the Lieutenant-Governor must be communicated." And *cf.* the Australian case of *Attorney-General* v. *Goldsbrough*, (1889) 15 V. L. R. 638, at p. 647.

83. Until the Legislature of Ontario or of Quebec otherwise provides, a person accepting or holding in Ontario or in Quebec any office, commission, or employment, permanent or temporary, at the nomination of the Lieutenant-Governor, to which any annual salary, or any fee, allowance, emolument, or profit of any kind or amount whatever from the Province is attached, shall not be eligible as a member of the Legislative Assembly of the respective Province, nor shall he sit or vote as such; but nothing in this section shall make ineligible any person being a member of the Executive Council of the respective Province, or holding any of the following offices, that is to say: the offices of Attorney-General, Secretary, and Registrar of the Province, Treasurer of the Province, Commissioner of Crown Lands, and Commissioner of Agriculture and Public Works, and in Quebec Solicitor-General, or shall disqualify him to sit or vote in the House for which he is elected, provided he is elected while holding such office.[5]

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[5] The British North America Act, 1867, does not prohibit members of the Dominion Cabinet or of provincial Executive Councils being members of the legislature during their continuance in office, and so preserves the British system of responsible government in Dominion and province alike. Here we get a leading point of distinction between Canada and the United States. Article 1, section 6, of the Constitution of the United States provides that:—'No person holding any office under the United States shall be a member of either House (*i.e.*, the Senate or the House of Representatives) during his continuance in office.' In like manner in all the States of the Union the executive is quite separate from the legislature. None of them have our system of responsible parliamentary government. We may say generally, both of the Dominion and provincial Constitutions, in the words of the late Sir John Bourinot, that 'that great body of unwritten conventions, usages and understandings which

85. Every Legislative Assembly of Ontario and every Legislative Assembly of Quebec shall continue for four years from the day of the return of the Writs for choosing the same (subject nevertheless to either the Legislative Assembly of Ontario or the Legislative Assembly of Quebec being sooner dissolved by the Lieutenant-Governor of the Province) and no longer.

86. There shall be a Session of the Legislature of Ontario and of that of Quebec once at least in every year, so that twelve months shall not intervene between the last sitting of the Legislature in each Province in one Session, and its first sitting in the next Session.

88. The Constitution of the legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union until altered under the authority of this Act . . .[6]

90. The following provisions of this Act respecting the Parliament of Canada, namely: the provisions relating to appropriation and tax

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have in the course of time grown up in the practical working of the English Constitution form as important a part of the political system of Canada as the fundamental law itself which governs the federation:' Maple Leaves, at p. 97. See, also, an Article on The Theory and Practice of the Constitution by T. B. Flint (1908), 28 C. L. T. 114; and one on 'Fact and Fiction in the Canadian Constitution,' by R. T. Mullin, 7 Rev. L. 144 (1901). "The unwritten Constitution of England is a growth, not a fabric:" per Lord Loreburn, L.C., in *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1912] A. C. at p. 586.

[6] The same applies to the provinces of British Columbia and Prince Edward Island, which, in joining the Dominion, retained their provincial constitutions subject to the provisions of the British North America Act, 1867. In the same way the provinces

Bills, the recommendation of money votes,[7] the assent to Bills, the disallowance of Acts, and the signification of pleasure on Bills reserved—shall extend and apply to the legislatures of the several Provinces as if those provisions were here re-enacted and made applicable in terms to the respective Provinces, and the Legislatures thereof, with the substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the (King) and for a Secretary of State, of one year for two years, and of the Province for Canada.

JUDICATURE.

96. The Governor-General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

99. The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons.

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of Manitoba, Alberta and Saskatchewan, when constituted, were provided with Constitutions similar to that of the province of Ontario (excepting that Manitoba was given a Legislative Council as well as a Legislative Assembly, but the former was abolished by Manitoba Statute, 39 Vict. c. 28, in 1876); and the provisions of the British North America Act, 1867, are made to apply to them 'in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if (each of said provinces) had been one of the provinces originally united.'

[7] The provisions as to appropriation and tax bills and the recommendation of money votes are to be found in sections 53 and 54 of the British North America Act, 1867, and reproduce

100. The salaries, allowances, and pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in cases where the Judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada.

101. The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada.[8]

The above provisions of the British North America Act, 1867, give the constituent parts and fundamental features of the Constitution of the Dominion of Canada. We shall now refer to certain general considerations to be borne in mind in dealing with the Constitution. Then we shall consider the position of the Crown in

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the usage of the Imperial parliament. See Bourinot's Parliamentary Procedure and Practice in the Dominion of Canada, chap. XVII., pp. 530-581. See, however, now Imperial Parliament Act, 1911, s. 1.

[8] A Supreme Court and Exchequer Court of Canada, with right of final appeal to the Supreme Court from the judgments of Courts of last resort in the provinces, 'saving any right which (His) Majesty may be graciously pleased to exercise by virtue of (his) royal prerogative,' was established in 1875. By Dominion Act of 1887 all original Exchequer Court jurisdiction was taken away from the judges of the Supreme Court of Canada, and transferred to one single judge, to be called the Judge of the Exchequer Court of Canada, duly appointed under the Act; and the Exchequer Court has since then constituted a tribunal entirely distinct from that of the Supreme Court of Canada, but with a right of appeal to that Court. See, also, *infra* pp. 672-688.

Canada, and its relation to the Dominion parliament, and the provincial legislatures; and discuss, incidentally, the Dominion veto power over provincial Acts. After this, we shall endeavour to explain, in the light of the authorities, the distribution of legislative powers, within the Dominion, between the Dominion parliament on the one hand and the provincial legislatures on the other. And finally shall treat concisely of the construction to be put on their respective specific powers.

CHAPTER II.

SOME GENERAL CONSIDERATIONS.

There is to be found in the judgments in some of the earlier cases, a somewhat confused and confusing notion that in considering the provisions of the British North America Act in respect to the distribution of legislative powers between the Dominion and the provinces we may sometimes have to go behind and beyond its terms, and consider what the representatives of the confederated provinces intended when they consented to enter into the Union, or the position of the different provinces before the Union, and the powers of legislation they then possessed, and the manner in which they were wont to exercise these powers.[1] But it may be said to be pretty well established now that the British North America Act itself is the sole charter by which the rights claimed by the Dominion and the provinces respectively can be determined; and that although the British North America Act was founded upon the Quebec Resolutions, and so must be accepted as embodying a treaty of union between the provinces, yet when once enacted it constituted a wholly new point of departure, and established the Dominion and provincial Governments with definite powers and duties, both alike derived from it as their source.[1a] From this it follows that the state of legislation and the legislative powers exercised in the various provinces prior to Confederation can at most only be usefully referred to to throw light upon the language of the Imperial Act when that language is doubtful. For example, in a recent report of May 23rd, 1911, Sir Allen Aylesworth, Minister of Justice, expressed the view that the word " Banking " in No. 15 of sec. 91, " is intended to describe not only such powers as are inherently banking powers, but, also, those which were, under the laws of the provinces at the time of the Union, exercised by the banks in the carrying on of their business." And it may even be that the course and character of legislation in England itself may, in some cases, throw light upon the proper interpretation of the British North America Act.[2] The difficulties which arise if we attempt to rely upon the state of legislation and other circumstances in the provinces prior to Confederation when seeking to interpret the British North America Act, are obvious. For instance, the state of things existing in some of the provinces prior to Confederation were in some instances different from those existing in others of the provinces, and where this was the case, either the interpretation of the British North America Act must vary according to the province to which it is being applied, or we must select some particular province or provinces in seeking for light in construing it, or lastly, we must take up the bold and comprehensive position assumed by Dorion, C.J., in *Cooey* v. *The Corporation of the County of Brome,*[2a] where he says:—"In the absence of any expression to restrict the powers so conferred" (*sc.* by Nos. 8 and 16 of section 92 of the Federation Act) "they must be understood to comprise all those matters which, at the time the Union was effected, had been considered by the existing legislatures as belonging to municipal institutions or as being of a local or provincial character."

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[1] See Law of Legislative Power in Canada, pp. 1-20; 41-61, where the cases are all collected.

[1a] As to reference to the debates on the British North America Act not being admissible to influence the Courts in its construction, see *Maher* v. *Town of Portland*, in the Privy Council, as reported in Wheeler's Law of Confederation, at p. 362. As to any supposed inherent right in a Canadian legislature to repeal its own legislative Acts, the Privy Council, in *Brophy* v. *Attorney-General of Manitoba*, [1895] A. C. at pp. 222-3, say, with special reference to sec. 22, sub-sec. 2 of the Manitoba Act (see *infra*, p. 654) whereby an appeal to the Governor-General in Council is given from any act or decision of the legislature of the province, or of any provincial authority, affecting any right or privilege of the protestant or Roman Catholic minority of the (King's) subjects in relation to education: " If, upon the natural construction of the language used, it should appear that an appeal was permitted in circumstances involving a fetter upon the power of a provincial legislature to repeal its own enactments, their lordships see no justification for a leaning against that contention, nor do they think that it makes any difference whether the fetter is imposed by express words, or by necessary implication." And in their recent judgment in *Royal Bank of Canada* v. *The King*, [1913] A. C. at p. 296 (noticed at length *infra* pp. 504-9 *q.v.*), their lordships say that they " agree with the contention of the respondents that in a case such as this it was in the power of the Alberta legislature subsequently to repeal any Act which it had passed. If this were the only question which arose, the appeal could be disposed of without difficulty. But the Act under consideration does more than modify existing legislation. It purports to appropriate to the province the balance standing at the special accounts in the banks, and so to change its position under the scheme to carry out which the bondholders had subscribed their money."

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[2] See Law of Legislative Power in Canada, pp. 61-[illegible], and *infra*, p. 231.

[2a] Quoted in *Lepine* v. *Laurent* (1891), 17 Q. L. R. at p. 229.

It also follows that no consent or acquiescence of the Crown in the form of non-exercise of the veto power, or otherwise, can render valid an Act otherwise *ultra vires* and unconstitutional under the British North America Act; and that no Colonial Secretary has *ex officio* a right by a despatch, or otherwise, either to add to, alter, or restrain any of the legislative powers conferred by the Act, or to authorize a subordinate legislature to do so. It also follows, above all, that provincial legislatures have no powers excepting the enumerated powers which are given to them by the Act.

Again, the British North America Act, although upon it is established the Constitution of a vast Dominion, is, after all, a statute, and Courts of law must treat its provisions by the same methods of construction and exposition which they apply to other statutes, no matter how great the constitutional importance of questions which may be raised. As the Privy Council say in their very recent judgment in respect to References by the Dominion Government to the Supreme Court[3] of May 16th, 1912: "In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit, the text is conclusive, alike in what it directs, and what it forbids. When the text is ambiguous, as for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside Canada) or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act." At the same time the character of this statute must of course be borne in mind. As has been well said, "The British North America Act conferring legislative powers is not to be construed rigorously, like a penal Act conferring judicial powers."[3a] A liberal construction must be given to it as a constitutional statute conferring and distribut-

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[3] *Attorney-General for Ontario* v. *Attorney-General for Canada,* [1912] A. C. 571. In *Webb* v. *Outrim,* [1907] A. C. at pp. 90-1, their lordships declared themselves unable to acquiesce in any such principle of construction as would rest on the knowledge of those who framed the Australian Constitution, and their supposed preference for this or that model which might have been in their minds. In the course of the argument before the Privy Council of Canada in January, 1912, upon the question whether the Dominion Government should veto the Alberta Act of 1910

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respecting the Alberta and Great Waterways R. W. Co., Mr. Newcombe, Deputy-Minister of Justice, remarks: "Of course the British North America Act must mean the same thing now that it did when it was passed." Reference, however, may be usefully made on this point to the Australian case of *Attorney-General of New South Wales* v. *Brewery Employees' Union* (1908), 6 C. L. R. 469.

[3a] Per Sanborn, J., in *Paige* v. *Griffith* (1873), 18 L. C. J. at p. 122.

ing high and large powers of government, both as to Canada and the provinces.

One more general observation is suggested by the words of a recent judgment of the Judicial Committee of the Privy Council.[4] In estimating the relation of Canadian legislation to the provisions of the British North America Act relating to the distribution of legislative power, it is proper to remember that some points of view may be more natural to a young and growing community interested in developing the resources of a vast territory as yet not fully settled than they could possibly be in the narrow and thickly populated area of such a country as England; and generally to bear in mind the actual conditions of Canada. In the same spirit their lordships observe in their recent judgment just referred to that "The needs of one country may differ from those of another, and Canada must judge of Canadian requirements."[5]

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[4] *City of Toronto* v. *Canadian Pacific R. W. Co.*, [1908] A. C. 54, at p. 58.

[5] [1912] A. C. at p. 587. See, also, *infra* pp. 177-8.

CHAPTER III.

THE CROWN IN CANADA.[1]

1. The Crown one and indivisible.—In a very recent Canadian appeal the Privy Council have concisely dealt with the position of the Crown in Canada as follows:[2] " In 1763, Canada and all its dependencies with the sovereignty, property and possession, and all other rights which had at any time been held or acquired by the Crown of France, were ceded to Great Britain. Upon that event the Crown of England became possessed of all legislative and executive powers within the country so ceded to it, and save so far as it has since parted with these powers by legislation, royal proclamation, or voluntary grant, it is still possessed of them . . The Imperial Government might delegate those powers to the Governor or the Government of one of the Colonies either by royal proclamation, which has the force of a statute, or by a statute of the Imperial parliament, or by a statute of a local parliament to which the Crown has assented. If this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them."

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[1] For authorities generally in reference to the Crown, see, also, Law of Legislative Power in Canada, pp. 72-184. And on the general subject of the Crown in the Dominions, and Colonial Governors, see Keith's Responsible Government in the Dominions (1912), vol. 1, pp. 83-353. As to Crown property see *infra*, pp. 709-10. See, also, an article on The Crown as representing the State, by P. Cobbett (1903), 1 Commonw. L. R. 23, 145. In March, 1875, the Dominion House of Commons, as the time allowed for the exercise of the Dominion veto power in respect to a certain New Brunswick Act relating to education (being the Act held *intra vires* by the Privy Council in *Maher* v. *Town of Portland*, *infra*, pp. 631-2) had elapsed, addressed the Crown in favour of a modification of the law through Royal influence. The Crown, however, by a despatch from Lord Carnarvon of October 18th, 1875, pointed out that while, as the Address admitted, the passing of an Act to affect the provincial law would be unconstitutional, as the matter was one of local interest, the attempt to exercise the Royal authority by way of an appeal to the province to amend the law would also be unconstitutional, and there the matter ended, as New Brunswick stuck to its decision not to establish separate schools: Can. Sess. Pap. 1877, No. 89, p. 434; Keith's Responsible Government in the Dominions, vol. 2, p. 690. For a recent petition direct to the Crown on behalf of the Indians of British Columbia, see *infra*, pp. 713-4.

[2] *Attorney-General of Canada* v. *Cain*, [1906] A. C. 542, at pp. 545-6. In this decision the Judicial Committee affirmed the authority of the Dominion parliament to enact provisions for the deportation from Canada of aliens as provided in the Alien Labour Act. See this case further noticed *infra*, p. 304.

The prerogative of the Crown runs in Canada to the same extent as in England; and the prerogative of the King, when it has not been expressly limited by Imperial statute, or by valid local law or statute, is as extensive in His Majesty's colonial possessions as in Great Britain. As has been well said: " For the purpose of entitling itself to the benefit of its prerogative rights the Crown is to be considered as one and indivisible throughout the Empire, and is not to be considered as a quasi-corporate head of several distinct bodies politic (thus distinguishing the rights and privileges of the Crown as the head of the Government of the United Kingdom from those of the Crown as head of the Government of the Dominion, and, again distinguishing it in its relation to the Dominion and to the several provinces of the Dominion)."[2a]

Thus His Majesty's prerogative rights over the Dominion of Canada as the fountain of honour[2b] or of mercy[2b] have not been in the least degree impaired or lessened by the British North America Act. So, again, whatever rights and prerogatives the Crown has when suing in respect of Imperial rights, it has the same when suing in the Colonies. And so it was held in one case that the Crown as represented by the Dominion Government had, when claiming in New Brunswick as creditor of a bank, priority over other creditors of equal degree according to the general rule of English law.[2c]

[2a] Per Strong, J., in *The Queen* v. *Bank of Nova Scotia* (1885), 11 S. C. R. 1, at p. 17. The same learned judge in *Attorney-General of Canada* v. *Attorney-General of Ontario* (frequently spoken of as the Pardoning Power case) (1894), 23 S. C. R. at p. 469, says: " That the Crown, although it may delegate to its representatives the exercise of certain prerogatives, cannot voluntarily divest itself of them, seems to be a well-recognized constitutional canon." The two Australian cases, *The King* v. *Sutton* (1908), 5 C. L. R. 789, and *Attorney-General of New South Wales* v. *Collector of Customs* (1908), ibid. 818, may also be referred to in this connection.

[2b] It may be of interest to put upon record the practice at the present time in regard to conferring Imperial honours upon Canadians. The writer has taken some pains to ascertain this, and is informed upon the best authority as follows: The practice is for the Governor-General, when invited to do so, to make recommendations to the Secretary of State for the Colonies. It is customary for him on such occasions, as a matter of courtesy and expediency, before sending his list home, to show it to his Prime Minister, asking him (1) if he has any objection to any of the names on the list, and (2) if there are any names he would like to add thereto. But this is to the Prime Minister as distinct from the Cabinet, who have no collective responsibility in the matter. This is the rule. The Governor-General naturally pays much deference to his Prime Minister's wishes, though there have been cases where honours have been conferred on Canadians resident in Canada without even the knowledge of the Prime Minister. Such instances are, however, comparatively rare. Of course there must be some responsible Minister for the grant of every honour. In the case of honours conferred upon Canadians resident in the Dominion, the responsible adviser is the

But the Crown is a party to and bound by both Dominion and provincial statutes so far as such statutes are *intra vires,* that is, relate to matters placed within the Dominion and provincial control respectively by the British North America Act.[2d] And generally, although as we have seen the British North America Act de-

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Secretary of State for the Colonies. The prerogative of honour is not one of those delegated to the Governor-General: (see Todd's Parl. Gov. in Brit. Col., 2nd ed., p. 313). In Canada the provincial governments do not recommend names for Imperial honours. In Australia, on the other hand, State Governors do make recommendations to the Crown, as well as the Governor-General, but are required to send to the Governor-General the list of honours so recommended: Article by Professor Harrison Moore in Journal of Soc. of Compar. Legisl., N.S., 1903, p. 125. The prerogative of mercy is specially delegated to the Governor-General in his instructions, but not since 1905 as to offences against provincial laws. See A. B. Keith's Responsible Government in the Dominions, (1912) Vol. 1, at pp. 1565-6. See, also, on the whole subject of the prerogative of mercy in the Dominions, Keith *op. cit.* Vol. 3, pp. 1386-1422. And a reference to the following parliamentary papers in connection with this prerogative may also be of use: Can. Sess. Pap., 1869, No. 16; *ibid*, 1875, No. 11; *ibid.*, 1877, No. 13; Ont. Sess. Pap., 1888, No. 37; Imp. Hans., April 16th, 1875 (3rd Ser. Vol. 223, p. 1065 *seq.*); Imp. Parl. Pap. North Amer., 1879, No. 99. See, also, *infra* p. 386, and Legislative Power in Canada, pp. 180-184.

[2c] *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A. C. 437, affirming the Courts below, 20 S. C. R. 695, 27 N. B. 379. So, too, *Queen* v. *Bank of Nova Scotia* (1885), 11 S. C. R. 1; *Maritime Bank* v. *The Queen*, 17 S. C. R. 657. See, also, *Exchange Bank* v. *The Queen* (1886), 11 App. Cas. 157; and Legislative Power in Canada, pp. 72-86.

[2d] In a report on a British Columbia Act respecting Workmen's Compensation for injuries suffered in the course of their employment, the Minister of Justice says that he "apprehends that it is incompetent to a provincial legislature to so legislate

clares by section 9 that 'the executive government and authority of and over Canada continues and is vested in the King,' a gift of legislative power carries with it a corresponding executive power, even where such executive power is of a prerogative character, unless there be some restraining enactment.

For example, it is beyond dispute that by virtue of their power over the administration of justice in the province, including the constitution, maintenance, and organization of provincial Courts, provincial legislatures may confer power on the local Executives to appoint judicial officers to preside over such Courts, provided they do not contravene the provisions of section 96 of the British North America Act, that 'the Governor-General shall appoint the judges of the Superior, District, and County Courts in each province.'[2e] And when in 1887 the Ontario Government submitted to the law officers of the Crown in England the question whether provincial legislatures have power to appoint or to authorize the Lieutenant-Governor to appoint Queen's Counsel, they responded that in their opinion provincial legislatures had this power under No. 4 of section 92 of that Act, which assigns to them the establishment and tenure of provincial offices, the appointment of Queen's Counsel being the appointment to an office.[2e] And

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as to impose a liability upon the Crown in right of Canada, and that in so far as this Act is intended to have that effect, it is *ultra vires*:" Prov. Legisl., 1901-3, pp. 83-84.

[2e] Ont. Sess. Pap., 1888, No. 37, at p. 30. And see now Queen's Counsel Case, [1898] A. C. 247, 23 O. A. R. 792, over-ruling *Lenoir* v. *Ritchie* (1879), 3 S. C. R. 575.

so the Privy Council have held that a colonial Act assented to by the Crown through its authorized representative can interfere with and regulate the exercise of the prerogatives of the Crown as the fountain of justice, so far as the rights of those under its jurisdiction are concerned, as by restricting the right of appeal to the King in Council.[2f]

2. The representatives of the Crown in Canada.—The Crown, however, is represented in Dominion affairs by the Governor-General, and in provincial affairs by the Lieutenant-Governors of the provinces, for although long doubted, it is now decided by the ultimate Court of Appeal, that Lieutenant-Governors of provinces, when appointed, are as much the representatives of His Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government.[3] And, as has been pointed out, although, speaking generally, provincial legislatures have power to amend, from time to time, notwithstanding anything in the British North America Act, the Constitution of the province, they have no such power as regards the office of Lieutenant-Governor,[4] because the Lieutenant-Governor represents the Crown. At the same time, as has been judicially stated,[4a] this, no doubt, does not inhibit a statutory increase of powers and duties germane to the office being imposed on the Lieutenant-General of the provincial Government, as, for example, the power of commuting and remitting offences against the laws of the province, or offences over which the legislative authority of the province extends. It means rather, in words of Mr. Edward Blake, " that those elements of

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[2f] See *Cuvillier* v. *Aylwin* (1832), 2 Kn. P. C. 72; *The Queen* v. *Edulgee Byramjee*, (1846) 5 Mo. P. C. at p. 295; *In re Wi Matua's Will*, [1908] A. C. 448; *Mowat* v. *Casgrain*, (1896) R. J. Q. 6 Q. B. 12, *infra*, p. 297. And see, further, as to Executive power being derived for legislative power: Legislative Power in Canada, at pp. 123-176.

[3] *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A. C. 437, and for the authorities generally, see Law of Legislative Power in Canada, pp. 90-122. As to the Lieutenant-Governor of the North-West Territories only having power to approve or reserve measures, but none to withhold assent, see report of Minister of Justice of February 10th, 1876: Hodgins' Prov. Legisl., 1867-1895, p. 1279; and as to when he should do so: see *ibid.* pp. 1276-7. As to the provincial Attorney-General being the proper officer to assert the rights of the Crown in the Courts of the province, even in respect to the violation of rights created by a Dominion Act and to enforce the criminal law of the Dominion: see *Attorney-General of Ontario* v. *Niagara Falls International Bridge Co.*,

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(1873) 20 Gr. 34; *Attorney-General of Ontario, ex rel. Barrett* v. *International Bridge Co.* (1881), 28 Gr. 65, 6 A. R. 537; *Monk* v. *Ouimet*, (1874) 19 L. C. J. 71. As to the Attorney-General of the province being the proper authority to grant a fiat for *sci. fa.* proceedings to set aside a patent: see *Queen* v. *Pattee*, (1871) 5 O. P. R. 292. For an unsuccessful attempt to hold responsible the members of a provincial Executive Council who had concurred in an *ultra vires* Order in Council for the sale of Crown lands, and in the execution of a deed of the same to a purchaser pursuant to such Order in Council, see *Church* v. *Middlemiss*, (1877) 21 L. C. J. 319, afterwards referred to in *Liquidators of the Maritime Bank of the Dominion* v. *Receiver-General of the province of New Brunswick* (1889) 20 S. C. R. at p. 698. And see as to the province of Quebec, *Black* v. *The Queen*, (1899) 29 S. C. R. 693. In the Australian cases of *King* v. *Governor of the State of South Australia* (1907), 4 C. L. R. 1497, and *Horwitz* v. *Connor* (1908) 6 C. L. R. 39, the High Court of the Commonwealth held that no *mandamus* lay to the Governor of a State, or to the Governor in Council, even while performing an act enjoined upon him by a Commonwealth statute. See, also, *Attorney-General* v. *Ewen* (1895), 3 B. C. 468.

[4] Section 92, No. 1.

[4a] See *infra*, p. 385.

the Constitution which can be properly deemed to be parts of the Constitution relating to the office of the Lieutenant-Governors, are not to be changed; and for an obvious reason, because the Lieutenant-Governor is the link between the federal and the provincial, aye, and between the Imperial and the provincial authority; he is the means of communication, he is the chain and conduit of Imperial as well as federal connection; and, therefore, his office in the Constitution, his constitutional position as a federal officer, is not to be affected." [4b]

The Governor-General and the Lieutenant-Governor, then, being alike, in their respective spheres, the representatives of His Majesty, the question remains how far and in what manner they are invested with the power and duty of exercising his royal prerogatives. As to this it would seem that, in accordance with the general law of the Empire, such powers of the Crown as are not expressly or impliedly conferred by the British North America Act, or dealt with by statute, local or imperial, exist, whether in the Governor-General or in the provincial Lieutenant-Governors, only by delegation from the Sovereign, and, until so controlled by statute law, can be withdrawn or modified and regulated, by the Sovereign, acting under the advice of his Imperial Ministers, as to the Governor-General directly, and as to Lieutenant-Governors mediately through the Governor-General. For it is well decided that a colonial governor under the British system is not a viceroy, but is vested with an authority limited by the terms of his commission and instructions; and, of course, by the terms of any statute conferring authority upon him, or regulating his powers. And, therefore, it seems impossible to accept as correct the theory advanced in 1886 by the Ontario Government, and supported by some few recent judicial utterances, that provincial lieutenant-governors are entitled, *virtute officii*, and without express statutory enactment, or express delegation from the Crown, to exercise all prerogatives incident to executive authority in matters over which provincial legislatures have jurisdiction; and that the Governor-General, in like manner, is entitled, *virtute officii*, and without any statutory enactment, or express delegation from the Crown, to exercise all prerogatives incident to executive authority in matters within the jurisdiction of the federal parliament. According to this view the Governor-General and the Lieutenant-Governors became, in place of the Queen whose deputies they were, the sovereign authorities of the Dominion and the provinces respectively when the British North America Act, 1867, came into force, although that Act by section 9 expressly enacts that 'the executive authority over Canada is declared to continue and be vested in the Queen,' and by several other express provisions seems very clearly to show that all prerogative functions and powers not in some way bestowed by it upon the Governor-General or the Lieutenant-Governors remain vested in the Sovereign. But this is not saying that executive power is not included in legislative power. *The Queen's Counsel* case,[4c] is clear authority that it is. Their lordships there say:—" By the combined effect of these enactments " (*sc.* Nos. 1, 4, and 14 of section 92 of the British North America Act) " it is entirely within the discretion of the provincial legislature to determine by what officers the Crown, or, in other words, the Executive government of the province, shall be represented in its Courts of law or elsewhere, and to define by Act of parliament the duties whether substantial or honorary, which are to be incumbent upon these officers, and the rights and privileges which they are to enjoy. The (Ontario) Revised Statute of 1877, in so far as it relates to the appointment of Queen's Counsel, is, in the opinion of their lordships, within the limits of that authority; and, that being so, there appears to them to be no ground for the suggestion that its provisions when given effect to by the Lieutenant-Governor will constitute an encroachment upon the prerogative of the Crown, or upon the rights of any representative of the Crown to whom, by the terms of his commission, the right of appointing Counsel to represent the Sovereign may have been delegated." The matter may perhaps be deemed rather of theoretical interest than of practical importance, but unforeseen emergencies may arise in the history of the Empire when the preservation of the correct constitutional theory may prove of supreme moment.[5]

[4b] Published argument in Pardoning Power case in Ontario Court of Appeal (19 O. A. R. 31).

[4c] [1898] A. C. 247.

[5] See Law of Legislative Power in Canada, pp. 110-122, 320. Also see the views and criticisms of Mr. A. B. Keith, in his Re-

3. The veto power of the Dominion Government.—Before leaving the subject of the Crown in the Constitution of the Dominion, it is right to notice the veto power which the Federal Government possesses over provincial legislation, which is a special feature of the Constitution of Canada distinguishing it from that of the United States. In words of the Privy Council:[6] " Under the Constitution of the United States, each State may make laws for itself, uncontrolled by the federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction." But in the case of Canada, the British North America Act " makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated pro-

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sponsible Government in the Dominions, (1912) Vol. II., pp. 654-664. He says (p. 656): 'The real position of the Lieutenant-Governor is that he is the wielder of the executive power of the province, in its entirety, just as a Colonial Governor wields the power of the Colony. Some confusion has crept into the discussion of his position as the result of the vague use of the' ('word') 'prerogative. In its widest sense all executive government may be called a part of the prerogative, but the term is perhaps more generally applied merely to that portion of the executive authority which rests not on statute but on the common law. It may be more convenient to adopt the wider use of the term, and to ascribe to the Governor of a Colony and the Lieutenant-Governor of a province the royal prerogative, but it must be remembered that the prerogatives they wield are those appropriate to a Colony or province, and, as has been already seen, these prerogatives are not co-extensive with those of the Crown in the United Kingdom. . . The executive power is vested in the Crown and its representatives: it is not conferred but regulated by law. The only real question is what prerogatives are necessary for the provincial form of Government, and differences of opinion as to these matters are of course possible.' See, also, *op. cit.* Vol. 1, pp. 105-146.

[6] *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. at p. 587.

vinces a carefully balanced Constitution, under which no one of the parts can pass laws for itself, except under the control of the whole, acting through the Governor-General." This Federal veto power is that principle of central control of which the late Mr. Cardwell, as Secretary of State for the Colonies, says, in a despatch to the Governor-General of December 3rd, 1864,[7] acknowledging the receipt of Quebec Resolutions: "The importance of this principle cannot be overrated. Its maintenance is essential to the practical efficiency of the system, and to its harmonious operation, both in the general government and in the government of the several provinces."

It is important, then, to note, first of all, the precise character of this veto power, and, then, how we find it in fact being exercised after nearly half a century of Confederation.

By virtue of sections 56 and 90 of the British North America Act an authentic copy of every provincial Act has to be sent to the Governor-General, and if the Governor-General in Council, within one year after receipt thereof, thinks fit to disallow the Act, such disallowance, being signified by the Governor-General in the manner prescribed, shall annul the Act from and after the day of such signification. Thus one year, and no longer period, is allowed within which a provincial Act may be disallowed by the Governor-General in Council; and however detrimental, from the point of view of the federal Government, experience of its working may have shewn it to be, it cannot afterwards be vetoed. Moreover provincial Acts, if disallowed, must be disallowed altogether; this or that clause of an Act cannot be vetoed without the remainder.[8] And as Sir John Thompson, in a report to the Governor-General of December 27th, 1893, in respect to certain British Columbia Acts,[9] points out, there is no power vested in the Governor-General " to make a conditional disallowance, or to . . suspend the operation of a statute, so that the same may have no force or effect until and unless it be assented to by a majority of the members of a legislature constituted differently from that which exists." Moreover the Dominion House of Commons cannot constitutionally interfere with the operation of provincial Acts by passing resolutions urging their disallowance by the Governor-General. " If such a resolution were allowed to have effect, it would amount to a virtual repeal of the section of the British North America Act, 1867, which gives the exclusive right of legislating on these matters to the provincial legislatures."[10]

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[7] Can. Sess. Pap., 1865, Vol. 24, No. 12, p. 11.

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[8] Hodgins' Prov. Legisl., Vol. I., at pp. 674-5. On the other hand as Sir John Thompson points out in his report on the disallowance of the Quebec Act respecting District Magistrates, affirmed by Order in Council of January 22nd, 1889, (Hodgins' Prov. Legisl., 1867-1895, p. 357) the allowance of provincial legislation by the Dominion Government is not, in all cases, an admission of the validity of such legislation, having the effect of depriving the Federal authority of the right or power of disallowing statutes similar to those which have been permitted to go into operation.

[9] Provincial Legislation, 1867-1895, p. 1146.

[10] Despatch of the Secretary of State for the Colonies to the Governor-General of June 30th, 1873; Hodgins' Prov. Legisl., 1867-1895, p. 701-2.

Lastly, it is to be observed that no direct power of confirmation or disallowance of Acts of the provincial legislature rests with the Imperial authorities. The latter, however, not unfrequently intervenes, through the Secretary of State for the Colonies, by despatch to the Governor-General, with proposed or actual provincial legislation, by way of objection thereto, when the occasion arises. Thus in 1909 we find the Secretary of State for the Colonies suggesting the omission from an Ontario Act of certain clauses purporting to restrict the right of appeal to the Privy Council;[11] and about the same time, he, also, intervened in respect to Ontario legislation under which it was proposed to levy duties on property passing on death not locally situate in the province. The Dominion Government called his remonstrances to the attention of the Ontario Government, and asked to know what course they intended to pursue.[12] Again in 1911 the Secretary of State for the Colonies intervened in the interest of members of the English Institute of Chartered Accountants with an Ontario Act, relating to persons practising as accountants in Ontario; and the Minister of Justice recommended disallowance,[13] and the Act was disallowed accordingly. The power of the Imperial authorities to disallow a Dominion Act within two years after receipt thereof by a Secretary of State is preserved by section 56 of the British North America Act.[13a]

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[11] Report of Committee of Privy Council, approved April 27th, 1909.

[12] Report of Sir A. Aylesworth, Minister of Justice, of October 18th, 1909. See, also, *infra*, pp. 402-11.

[13] Report of Sir A. Aylesworth, Minister of Justice, of March 23rd, 1911.

And now as to the principles on which the federal veto power is and should be exercised. By what seems a perfectly sound and natural development of constitutional theory, a change of view has established itself since the early days of Confederation. Even so late as 1882 we find a Quebec appellate judge stating that "the true check for the abuse of (provincial) powers, as distinguished from an unlawful exercise of them, is the power of the central government to disallow laws open to the former reproach."[14] We must consider such a view as this now finally discarded. The change which has come over the authoritative view in this matter cannot be more concisely expressed than it was by Sir Allen Aylesworth, then Minister of Justice, in the course of a debate in the House of Commons, on March 1st, 1909, upon a motion for a return of all correspondence, etc., relating to the unsuccessful application for the disallowance of the Ontario Act, 7 Edw. VII. c. 15, respecting Cobalt Lake and Kerr Lake, whereby claims to certain mining properties then pending in the Courts were overridden.[15] He there says: "The large question of principle which was presented for consideration was simply whether or not the provincial legislature has the power, without control, to take one man's property and give it to another, and to take away from the person injured any right of redress in the Courts . . I think I may safely say that, if this identical question had arisen before 1896, this legislation would have been disallowed. And I will say at once that I believe that was the intention with which the framers of the British North America Act provided the right of disallowance in the statute." He then quotes various official utterances of judges and Ministers of Justice to shew that, even as late as 1893, the authoritative view was, that if provincial legislation interfered with rights of property without providing compensation, that circumstance afforded sufficient reason for the exercise of the power of disallowance; but, that his immediate predecessors in office—citing words of the Hon. David Mills, in 1901, and the Hon. Charles Fitzpatrick, in 1902—had expressed a different view, in which he fully concurred, viz., that each provincial legislature, within the sphere of its authority and jurisdiction, should be supreme and amenable only to its constitutional judges, the electors of its own province.[15a]

[13a] As to the power of reservation by the Governor-General, and of disallowance by the Imperial Government, see Keith's Responsible Government in the Dominions (1912) Vol. 3, p. 1007 *et seq.;* and the reports and Imperial despatches relating to Imperial supervision over Dominion legislation, collected in Hodgins' Prov. Legisl. 1867-1895, pp. 6-60. See, also, *infra* p. 56.

[14] Per Ramsay, J., in *The Corporation of Three Rivers* v. *Sulte*, 5 L. N. at pp. 334-5.

The Dominion Government, of recent years, has repeatedly recognized and acted on this principle. Thus, unsuccessful attempts to procure the disallowance of provincial Acts upon the grounds of manifest injustice and interference with vested rights, were made in the case of a Nova Scotia Act of 1899;[16] and again in 1901, in reference to an Ontario Act, where the Minister of Justice says, in a report of December 31st, 1901: "It is no doubt *intra vires* of the legislature, and if it be unfair, or unjust, or contrary to the principles which ought to govern in dealing with private rights, the constitutional recourse is to the legislature, and the acts of the legislature may be ultimately judged by the people. The undersigned does not consider, therefore, that your Excellency ought to exercise the power of disallowance in such cases;"[17] and, again, the same year, in connection with a British Columbia Act, where the Minister takes precisely the same ground in a report of December 31st, 1901.[18] And in the correspondence with the Department of Justice in reference to this last Act, the Attorney-General of British Columbia tenders an explanation of why the idea of disallowing provincial Acts, in such cases as the above, has been discarded by the Federal Government, which is worth noting. He says: "In the early days of Confederation, the Dominion Executive appears to have been imbued with the notion that the relation between the Dominion and the provinces was analogous to that existing between parent and child, and to have acted accordingly. That view of the status of the provinces has been overthrown by a series of Imperial Privy Council decisions, which have clearly established that the provinces, acting within the scope of their powers, are almost sovereign States, and that they are entitled to exercise all the prerogatives of the Crown not conferred upon the Dominion."[19]

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[15] Debates in Canadian House of Commons, March 1st, 1909, Vol. 89, pp. 1750-1758.

[15a] See Hodgins' Prov. Legisl. 1901-3, pp. 4, 46.

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[16] Provincial Legislation, 1899-1900, p. 52 *seq.*

[17] Provincial Legislation, 1901-3, at p. 4.

[18] *Ibid*, p. 46.

Again, in 1904, an unsuccessful attempt was made to procure the disallowance of a Manitoba statute respecting the town of Emerson, which had become insolvent, on similar grounds, and also on the ground that the legislation in question would have the effect of shaking the confidence of financial institutions in Canadian securities, the Minister declaring that "he does not consider that he can consistently with the practice which has grown up in such cases, review the propriety of the legislation, or recommend it for disallowance on the ground of its supposed injustice to any individual."[20]

But, probably, the final quietus to any supposed constitutional power in the Dominion Government to veto provincial Acts on the ground of unjust interference with vested rights has been given by the proceedings and correspondence which took place between the Dominion and Ontario Governments in reference to the suggested disallowance of the Ontario Power Commission Amendment Act, 1909, a statute which was passed in aid of the policy of the Ontario Government which had established the Hydro-Electric Power Commission in that province, with statutory powers to supply electrical energy to the municipalities of the province. This Act made alterations in contracts theretofore executed between certain municipal corporations and the Commission, and declared that the contracts so altered ' shall be conclusively deemed to be contracts executed by the corporations '; and enacted that every action theretofore brought, and then pending, calling in question the validity of the said contracts, or any by-laws purporting to authorize the execution of the same by the municipalities, or the jurisdiction, power, or authority of the Commission or of any municipal corporation, to exercise any power or do any of the acts which the Acts passed in reference to the Commission authorised to be done, ' shall be and the same is hereby forever stayed.'

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[19] As to prerogatives of the Crown the qualification should probably have been added: "so far as necessarily and properly incidental to the powers of legislation conferred upon them by the British North America Act": see *supra*, pp. 27-9.

[20] Provincial Legislation, 1904-1905, pp. 91-99.

The most strenuous efforts were made to procure the disallowance of this Act on the grounds that it, and the entire legislative scheme of which it formed a part, amounted to a breach of faith on the part of the Ontario Government, was an unjust interference with vested rights, and calculated to greatly injure the credit, not only of Ontario, but of Canada as a whole, as a field for investment, in the money markets of Europe, inasmuch as the provincial Government thus entered the field in competition with a number of companies, supported mainly by English capital, which had been allowed to expend enormous sums in the construction of works for developing electric power. All was in vain; and whatever one may think of the morality or policy of such legislation, there does not seem any real doubt that the position taken by the Attorney-General for Ontario, and acquiesced in by the Dominion Minister of Justice, is in constitutional theory perfectly sound, save, perhaps, so far as it may seem to question the constitutional propriety of the Federal Government vetoing provincial legislation of such a character as is calculated to seriously injure the credit of Canada as a safe field for investment of capital.[21] From the point of view of constitutional theory it seems impossible to deny the great force of the words of the Attorney-General of Ontario in a communication of December 7th, 1909, in which he says: " For upwards of 200 years the Lords and Commons of Great Britain have legislated without fear of the royal veto, although its existence has been undoubted; and, therefore, in full accord with the spirit and genius of British institutions, the people of the province, being entitled to all rights of British subjects elsewhere, and as free . . to legislate within their jurisdiction as the Lords and Commons of Great Britain are free to legislate, cannot submit to any check upon the right of the legislature to legislate with respect to subjects within its well-defined jurisdiction, although a technical right to disallow may exist. Any other view would mean that there are different grades of British subjects in the Empire; that the people of the several provinces of the Dominion have not, and are not entitled to, the full and free enjoyment of those civil rights and liberties which are enjoyed by British subjects in the mother country, a condition of things which would be intolerable.'' And so Sir Allen Aylesworth, as Minister of Justice, in his final report against disallowance, says: "In the opinion of the undersigned, a suggestion of the abuse of power, even so as to amount to practical confiscation of property, or that the exercise of a power has been unwise or indiscreet, should appeal to your Excellency's Government with no more effect than it does to the ordinary tribunals, and the remedy in such case is, in the words of Lord Herschell, an appeal to those by whom the legislature is elected.''

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[21] This last point came up again in the proceedings taken to procure the disallowance of the recent Alberta legislation in reference to the Alberta and Great Waterways Railway Company. The legislation, however, was not disallowed. See *infra*, p. 42. *Cf.*, also, an opinion given by Mr. A. V. Dicey in reference to the Disallowance of Provincial Acts as unjust and confiscatory, (1909) 45 C. L. J. 457.

It is unlikely, also, that the Federal Government will often hereafter disallow provincial Acts on the ground that they are *ultra vires,* unless they are seriously injurious to Imperial or Dominion policies or interests. There is great force in the position taken up by the Government of British Columbia in a communication to the Department of Justice of August 22nd, 1905, in connection with the suggested disallowance of a British Columbia statute of that year, requiring commercial travellers and other persons not resident in the province to take out a license before soliciting orders therein, namely, that—" unless the Bill should be a clear and palpable attempt on the part of the province to invade the legislative field of the Dominion parliament, provincial Acts should not be disallowed by the Governor-General-in-Council on constitutional grounds only. The effect of disallowance, except on the principle mentioned, is to make the Minister of Justice the highest judicial dignitary in the land for the determination of constitutional questions, and in reality above the Supreme Court of Canada. The decisions of the Supreme Court of Canada are open to question in the Judicial Committee of the Privy Council. From the decisions of the Minister of Justice there is no appeal. He stands alone."[22] However, some statutes of the province of Saskatchewan of 1909, incorporating certain Loan & Investment & Trust Companies, and purporting to vest them with power to do business beyond the limits of the province, were disallowed on this ground, pursuant to a report of the Minister of Justice of January 9th, 1911, who says: " It is the duty of your Excellency's Government when persuaded by authority, or upon due consideration, that a provincial enactment is *ultra vires* of the legislature, to see that the public interest does not suffer by an attempt to sanction locally laws which can derive their authority only from the Parliament . . Great confusion and hardship may result from a statutory corporation carrying on a trust or investment business in excess of its corporate powers." And a Quebec Act of 1910, amending the charter of a company named the General Trust, was disallowed because it conferred upon the company powers which the Minister of Justice considered "infringed upon the subject of banking; and, also, because it apparently authorised the company to carry on a general business throughout Canada."

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[22] Provincial Legislation, 1904-1906, pp. 148-149.

The whole subject of the Dominion veto power was gone into at great length in the recent application before the new Conservative Government asking for the disallowance of the Alberta Act of 1910, c. 9, whereby the Alberta legislature purported to confiscate to the general revenue fund of the province certain moneys then on deposit with certain banks, the proceeds of the sale of bonds of the Alberta and Great Waterways Railway Company, the said moneys having been paid and deposited as aforesaid by the purchasers under an arrangement with the Alberta Government, and the railway company, confirmed by Alberta statute and Orders in Council, that they were only to be paid out, from time to time, to the railway company, or its nominee, in monthly payments, as the construction of the line proceeded. The Act, however, guaranteed the bonds, and provided for the indemnification of the railway company.[22a] On the application which was argued orally before a Committee of the Privy Council of Canada in January, 1912, it was contended that the Act was *ultra vires* as designed to raise provincial revenue in a manner not authorised by the British North America Act, and as interfering with the exclusive authority of Parliament with regard to banking; and that it unjustly diverted the proceeds of the bonds from the purpose of the construction of the road for which they had been raised and deposited, and injuriously affected the general credit and reputation of the Dominion. Mr. Doherty, however, in his report as Minister of Justice, dated January 20th, 1912, and duly approved by Order in Council, advised against disallowance, but at the same time he distinctly asserts that the veto power may constitutionally be exercised on the ground of hardship and injustice to the rights affected. He says: " There was considerable discussion at the hearing as to the practice and precedents in respect of disallowance of legislation by reason of unjust provisions, or because of its interference with vested rights or the obligations of contract, and a recent report of the predecessor in office of the undersigned was quoted as shewing that the Governor-General should in no case be advised to disallow for such reasons. It is true, as has been frequently pointed out, that it is very difficult for the Government of the Dominion, acting through the Governor-General, to review local legislation or consider its qualities upon questions of hardship or injustice to the rights affected, and this is manifest not only by expressions in reports of the Ministers, but also by the fact that but a single instance is cited in which the Governor-General has exercised the power upon these grounds alone. The undersigned entertains no doubt, however, that the power is constitutionally capable of exercise, and may on occasion be properly invoked for the purpose of preventing, not inconsistently with the public interest, irreparable injustice or undue interference with private rights or property through the operation of local statutes *intra vires* of the legislatures. Doubtless, however, the burden of establishing a case for the execution of the power lies upon those who allege it, and, although the undersigned is not prepared to express approval of the statute in question, which he feels must be regarded as a most remarkable execution of legislative authority, he is nevertheless not satisfied that a sufficient case for disallowance has been established either on behalf of the hondholders, the Bank, or the companies, especially when it is considered that the legislation sanctioned by the Assembly evidences as it does a very deliberate and important feature in the policy of the local Government . . The undersigned apprehends that it is sufficient for present purposes to say that he is not convinced, after the very thorough discussion to which the matter was subjected, that it was prejudicial to the credit of the Dominion, or not advisable in the interests of the province, to take legislative measures to prevent improvident application of these funds which had been raised virtually upon the credit of the province, and which the province had bound itself to repay with interest." [22b]

[22a] The Act was afterwards held *ultra vires* by the Privy Council: *Royal Bank of Canada* v. *The King*, [1913] A. C. 283. See *infra*, p. 504 *et seq.*

[22b] Upon the argument the following instances were cited, all it will be observed belonging to the earlier days after Confedera-

Imperial interference to protect rights of foreign creditors.—On the argument before the Privy Council of Canada in this Alberta case, Mr. Masten cited a despatch from Mr. Joseph Chamberlain, as Secretary of State for the Colonies, to the Governor of Newfoundland, announcing to him the decision of the Imperial Government not to disallow the Newfoundland Act confirming a contract entered into by the Government with a railway contractor, Mr. R. G. Reid, whereby the railways, docks, telegraphs, and steamship service, of the Colony were transferred to him. The despatch was printed in the 'Times' of January 23rd, 1899, and seems to confirm the views expressed in the text. Mr. Chamberlain says:

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tion, in which provincial Acts reserved for the consideration of the Governor-General had had assent refused to them on the ground of being contrary to sound principles of legislation: 1871, Manitoba: Hodgins' Prov. Legisl. 1867-1895, pp. 769-70; 1872, Manitoba: *ibid*, pp. 772-3; 1874, Prince Edward Island: *ibid*. p. 1155; 1874, Manitoba: *ibid*. p. 777; 1876, Prince Edward Island: *ibid*. p. 1178. The following instances of reports of Ministers of Justice recommending disallowance on similar grounds were cited: 1876, Quebec: *ibid*. pp. 275-8; 1881, Ontario: *ibid*. pp. 177-188-192; 1885, N. W. Territories: *ibid*. p. 1242; 1886, British Columbia: *ibid*. p. 1103; 1887, Manitoba: *ibid*. pp. 856-7; 1891, Manitoba: *ibid*. pp. 941-5. Mr. Lafleur, arguing in support of the application, contended that the new doctrine of the impropriety of disallowance on grounds of confiscation or impairment of contracts seems to have originated with Mr. Mills' report as Minister of Justice on a Manitoba Statute of 1898: Hodg. Prov. Legisl., 1898, pp. 72-3. Even Mr. Mills, however, recommended the disallowance of a Yukon Ordinance of 1898 on the ground that it unjustly discriminated against classes of barristers and solicitors, and imposed conditions which seemed impossible of performance: *Ibid*. 1898, pp. 121-2. Mr. Lafleur contended that the expressed opinions of the ten first Ministers of Justice, or acting-Ministers of Justice, clearly show that they did not consider that the scope of the Federal Government's powers of disallowance were restricted

"The right to complete and unfettered control over financial policy and arrangements is essential to self-government . . . The Colonial Government and legislature are solely responsible for the management of its finances to the people of the Colony, and unless Imperial interests of grave importance were imperilled, the intervention of Her Majesty's Government in such matters would be an unwarrantable intrusion and a breach of the charter of the Colony. . . It is asserted, indeed, that the contract disposes of assets of the colony over which its creditors in this country have an equitable, if not a legal claim, but . . . I cannot admit that the creditors of the colony have any right to claim the interference of Her Majesty's Govern-

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to cases of *ultra vires*, or of interference with federal policy; and that the practice which had been definitely settled before the term of office of Mr. Mills should be restored. As to the *dicta* of the Privy Council cited *infra*, pp. 66, 82-4, as to the fact of legislation amounting to a practical confiscation of property not making it *ultra vires*, and as to the plenary nature of the powers of Canadian legislatures, he observes that the attention of the Judicial Committee was directed there not to the case of laws which were still in suspense, but to statutes which had got beyond the stage of constitutional veto, and had become binding laws. Summing up Mr. Lafleur informed the Privy Council of Canada that the number of Acts actually disallowed on grounds of injustice under what he calls the old regime, *i.e.*, from Confederation to 1898, were five in number; but that in numbers of other cases the recommendations made by the Ministers of Justice led to a change in the law either by repeal or by amendment, and consequently the necessity for disallowance was obviated. As to the five cases thus referred to by Mr. Lafleur where disallowance actually followed, Mr. Masten, arguing on the other side, remarks as to them: "I find that in two of these cases, one principal ground of objection was that the rights of Dominion companies were prejudicially affected, which always is a recognised ground for disallowance, and therefore, it takes away from the strength of the remarks which are *obiter* on the other question."

ment in this matter. It is on the faith of the Colonial Government and legislature that they have advanced their money, and it is to them that they must appeal if they consider themselves damnified. No doubt if it was seriously alleged that the Act involved a breach of faith or a confiscation of the rights of absent persons, Her Majesty's Government would have to examine it carefully and consider whether the discredit which such action on the part of the colony would entail on the rest of the Empire rendered it necessary for them to intervene. But no such charge is made, and if Her Majesty's Government were to intervene whenever the domestic legislation of a colony was alleged to affect the rights of non-residents, the right of self-government would be restricted to very narrow limits, and complications and confusion from the division of authority must arise." But in the course of the same argument, Mr. Newcombe, Deputy Minister of Justice, sitting with the Privy Council of Canada, remarks: "There is a little difference between Imperial action in the disallowance of a colonial Act, and Federal action here, in that the Imperial Government disallows by virtue of the Royal prerogative without any advice based on the representations of the colony, whereas here I think the interpretation of the Judicial Committee that we have a carefully balanced constitution, under which no one of the provinces can pass laws for itself, except under control of the whole exercised by the Governor-General" (see *infra* pp. 188-9)" means that his Excellency is advised here locally under our system by the representatives of all the provinces, and, therefore, there is a reason for interfering locally which could not be urged in the case of colonial legislation dealt with at the Court in London."

Dominion interference on behalf of foreign immigrants.—But provincial Acts which discriminate against foreign immigrants and resident aliens are evidently treated by the Federal Government as standing on a footing of their own, quite apart from any question of Imperial treaty, and have been frequently disallowed. Thus in 1899, a British Columbia Act, the effect of which was that no person other than a British subject might, thereafter, be recognized as having any right or interest in any of the mining properties to which the British Columbia Placer Mining Act applied, was disallowed. So, also, in 1901, the Minister of Justice recommended the disallowance, unless amended in time, of a number of British Columbia Acts incorporating railway companies which contained a provision, in effect, that no aliens should be employed on them during construction unless it were demonstrated to the satisfaction of the Lieutenant-Governor in Council that the work could not be proceeded with without the employment of such aliens. In his report of December 27th, 1901, he puts it on the ground that the subjects of aliens and of immigration are within the exclusive authority of Parliament, but also, that "it has been, and is, the policy of your Excellency's Government to promote immigration, large sums of money being annually expended from the Dominion Treasury to that end. The efforts of your Excellency's Government would, however, be certainly paralyzed if the immigrant, upon coming to Canada, is to find the way of employment closed to him by provincial legislation." Actual disallowance, however, became unnecessary as the provincial authorities agreed to make the necessary amendments.[23] Again, in 1901, British Columbia Acts prohibiting immigration into the province of any immigrants who failed to satisfy an educational test of knowledge of a European language, and providing that no workman should be employed on works to be constructed under provincial franchises who failed to pass a similar test, were disallowed, at the urgent request of the Japanese Consul.[24] As Mr. Joseph Chamberlain points out, in a despatch to the Governor-General of January 22nd, 1901,[25] such legislation affects directly the relations of the Empire with foreign States.

A fortiori the Governor-General in Council may always be relied upon to veto provincial Acts contrary to Imperial treaties, which are placed under the special care of the Dominion by section 132 of the British North America Act, providing that 'the Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or any province thereof as part of the British Empire towards foreign countries arising under treaties between the Empire and such foreign countries.'

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[23] Provincial Legislation, 1901-1903, pp. 64, 74-75. For another case of disallowance being recommended on similar grounds: see *ibid.* p. 80.

[24] Provincial Legislation, 1899-1900, pp. 134-8, 145.

[25] *Ibid.* p. 139.

CHAPTER IV.

THE IMPERIAL PARLIAMENT.

The legislative bodies which have power to make statutes of one sort or another, binding upon Canadians, are the Imperial parliament, the Dominion parliament, and the various provincial legislatures. The British North America Act contains no renunciation of the paramount authority of the Imperial parliament. Powers of legislation conferred upon the Dominion parliament and the provincial legislatures, respectively, by that Act, are conferred subject to the sovereign authority of the Imperial parliament.[1] In the early days of Confederation, the idea was sometimes mooted, and in one reported case,[1a] apparently adopted by the late Chief Justice Draper, that when the British North America Act purports to give 'exclusive' legislative powers to the Dominion parliament and the provincial legislatures, respectively, it means 'exclusive of the Imperial parliament,' and not merely exclusive the one of the other. Any such view, however, was entirely and finally discountenanced by a decision of the Ontario Court of Appeal in 1876,[2] wherein the holder of a copyright, under the Imperial Copyright Act, 1842, sought for and obtained an injunction to restrain the defendants from publishing a reprint of his book in Canada, although the British North America Act gives the Dominion parliament 'exclusive' legislative authority over 'Copyrights,' and the Dominion Copyright Act, 1875, requires all authors desirous of obtaining copyright in Canada to print and publish and register under that Act,

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[1] For the authorities, generally, see Law of Legislative Power in Canada, pp. 208-231, where, however, the reference to 'The Royal' case (p. 212), is misleading, as, in fact, sec. 547 of the Imperial Merchant Shipping Act, 1854, gave permission to alter that Act as to vessels registered in Canada by any Act or Ordinance confirmed by Her Majesty in Council. As to Imperial Acts binding colonies, see *Callender Sykes & Co.* v. *Colonial Secretary of Lagos and Davies*, [1891] A. C. 460, 466-7; *New Zealand Loan and Mercantile Agency Co., Ltd.*, [1898] A. C. 349, at pp. 357-8. And on the general subject of Imperial control over legislation in the Dominions, see now Keith's Responsible Government in the Dominions (1912), Vol. 2, pp. 1007-31. The Commonwealth of Australia Constitution Act, Imp. 63-64 Vict. c. 12, gives the following power to the Federal parliament (sect. 51, No. xxxviii.):—'The exercise within the Commonwealth, at the request or with the concurrence of the parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the parliament of the United Kingdom, or by the Federal Council of Australasia.' No legislation has been passed under this head: Keith *op. cit.*,

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Vol. 2, p. 816, n. 2, who says that it 'is not of course an authority to alter Imperial Acts.' In a very kind notice of the present writer's Law of Legislative Power in Canada, in the Law Quarterly Review (Vol. 14, p. 199), Mr. A. V. Dicey observes:—'The curious idea suggested by Draper, C.J., that the words 'exclusive legislative authority,' which occur in the British North America Act, s. 91, exclude the legislative power of the Imperial parliament, could never have obtained the currency which it certainly has acquired if even learned lawyers had not occasionally failed to realise that the parliament at Westminster is a Sovereign legislature. It ought to be added that this sovereignty, so far from being inconsistent with the practical independence of the Canadian legislatures on all matters of solely Canadian interest, in some respects facilitates the amendment, whenever it may be required, of the Canadian constitution, and explains the absence of provisions for carrying out of constitutional changes.'

[1a] *Regina* v. *Taylor* (1875), 36 U. C. R. at p. 220.

[2] *Smiles* v. *Belford* (1876), 23 Gr. 590, 1 O. A. R. 436.

which the plaintiff had not done. The Imperial Copyright Act, 1842, expressly prohibited Her Majesty's colonial subjects from printing or publishing in the colonies, without the consent of the proprietor of the copyright, any work in which there was copyright in the United Kingdom, and, by another section, extended the operation of the Act to every part of the British Dominions. This being so, the plaintiff was held entitled to the remedy he sought. This decision, in fact, was only following a judgment of the House of Lords in England in 1868,[3] in which it was unsuccessfully contended that inasmuch as Canada had a legislature of her own, and was not directly governed by legislation from England, she was not included in the general words of the Imperial Act of 1842 above referred to, whereby that Act was extended to every part of the British Dominions. All the British North America Act did was to place the right of dealing with colonial copyright within the Dominion under the exclusive control of the parliament of Canada as distinguished from the provincial legislatures. Such, at all events, was the holding in this Ontario case.

All subsequent Canadian decisions have upheld, in like manner, the view that the paramount authority of the Imperial parliament has been in no wise lessened by our Federal Constitution. In fact, what is known as the Colonial Laws Validity Act, passed by the Imperial parliament in 1865, expressly provides that 'Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of parliament, extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.' And in a very recent judgment the Privy Council[4] has said that the obvious meaning of this enactment is "to preserve the right of the Imperial legislature to legislate even in a colony, although a local legislature has been given, and to make it impossible, when an Imperial statute has been passed expressly for the purpose of governing that colony, for the Colonial legislature to enact anything repugnant to an express law applied to that colony by the Imperial legislature itself . . This statute reconciles the two principles of giving local legislation, but, nevertheless, leaving still open to the Imperial legislature, by express legislative provision, the power to do something in the colony."

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[3] *Routledge* v. *Low* (1868), L. R. 3 H. L. 100.

But the intention of an Imperial Act to apply to self-governing colonies must be clearly expressed;[4a] and in practice the paramount power of legislation by the Imperial parliament is only exercised by Acts conferring constitutional powers, or dealing with a limited class of subjects of special Imperial or international concern, such as merchant shipping and copyright.

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[4] *In re The Queen* v. *Marais*, [1902] A. C. 51, at p. 54. See, also, as to this Act, *Regina* v. *Brierly*, (1887) 14 O. R. at p. 531, *et seq.* And for other declarations by the parliament of Great Britain of its authority over the colonies, see Imp. 6 Geo. III., c. 12, and section 46 of the Quebec Act, 31 Geo. III., c. 31. See, also, Stokes on the Colonies (1783), at pp. 29-30; Wheeler's Confederation Law, p. 346 *seq.* In the case of *The Farewell* (1881) 7 O. L. R. 380, it was held that when an Act of the Dominion parliament is in part repugnant to an Imperial statute effect will be given to its enactments in so far as they agree with those of the Imperial Act.

As to merchant shipping, the Merchant Shipping Act, 1894, which is now the governing Imperial statute, expressly provides that:—

'The legislature of a British possession may, by any Act or Ordinance, confirmed by Her Majesty in Council, repeal, wholly or in part, any provisions of this Act (other than those of the third part thereof which relate to emigrant ships), relating to ships registered in that possession; but any such Act or Ordinance shall not take effect until the approval of (His) Majesty has been proclaimed in the possession, or until such time thereafter as may be fixed by the Act or the Ordinance for the purpose.'
And,—

'The legislature of a British possession may, by any Act or Ordinance, regulate the coasting trade of that British possession, subject in every case to the following conditions:—

(*a*) The Act or Ordinance shall contain a suspending clause providing that the Act or Ordinance shall not come into operation until (His) Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed;

[4a] See per Vankoughnet, C., in *Penley* v. *Beacon Assurance Co.* (1864), 10 Gr. 422, at p. 428; and *supra*, p. 51, n. 1.

(*b*) The Act or Ordinance shall treat all British ships (including the ships of any other British possession) in exactly the same manner as ships of the British possession in which it is made.'

In like manner, at the late Imperial Conference, Sir Wilfrid Laurier said of the Imperial power of disallowance: "While the United Kingdom has asserted to itself the power to disallow any legislation which it is in the power of the self-governing Dominions to pass, it has been very chary of exercising that power, except in matters of shipping, whereon it has always maintained the doctrine that it has the power to supervise the legislation passed by the self-governing Dominions.[5]

As to copyright, the new Imperial Copyright Act, 1911 (which repeals the Imperial Act of 1842, above referred to), although it enacts that the Act, save as to such of its provisions as are expressly restricted to the United Kingdom, shall extend throughout His Majesty's Dominions, also provides that 'it shall not extend to a self-governing Dominion, unless declared by the legislature of that Dominion to be in force therein either without any modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies or necessary to adapt this Act to the circumstances of the Dominion as may be enacted by such legislature': (sec. 25).

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[5] Proceedings Imp. Conf. 1911, p. 406: cited Ewart's Kingdom Papers, pp. 222-3. On the whole subject of Merchant Shipping legislation in the Dominions, see Keith *op. cit.*, Vol. 3, pp. 1188-1215.

Also, that,—

'26. The legislature of any self-governing Dominion may, at any time, repeal all or any of the enactments relating to copyright passed by Parliament (including this Act), so far as they are operative within that Dominion: provided that no such repeal shall prejudicially affect any legal rights existing at the time of the repeal, and that on this Act, or any part thereof, being so repealed by the legislature of a self-governing Dominion, that Dominion shall cease to be a Dominion to which this Act extends. . . .'

Also, that,—

'27. The legislature of any British Possession to which this Act extends may modify or add to any of the provisions of this Act in its application to the Possession, but, except so far as such modifications and additions relate to procedure and remedies, they shall apply only to works the authors whereof were, at the time of the making of the work, resident in the Possession and to works first published in the Possession.'

It remains to mention a position advanced by the late Sir John Thompson, when Minister of Justice, notably in the debate in the Dominion House of Commons,[6] and in the communications which passed between the Dominion and Imperial Governments in reference to copyright legislation,[7] that in relation to all those subjects in respect to which power to legislate is given by the British North America Act to the Dominion parliament and provincial legislatures respectively, they have the power to repeal an Imperial statute passed prior to the British North America Act affecting those subjects though expressed to extend to the colonies. This view, however, has not found favour with the Law Officers of the Crown in England, nor can any decisions of the Courts be cited in its support. On the contrary it seems opposed to the view taken by the Privy Council of the Imperial Colonial Laws Validity Act of 1865, and its application, in the recent case of *In re The Queen* v. *Marais*,[8] referred to above.

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[6] Commons Debates, Vol. 27, p. 864, March 27th, 1889.

[7] Legislative Power in Canada, pp. 223-231. See the various reports and despatches relating to Canadian copyright collected in Hodgins' Prov. Legisl.. 1867-1895, pp. 12-13, 30-58c, and App. A., p. 1281-1313.

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[8] [1902] A. C. 51, at p. 54. See, however, the Australian case of *The Queen* v. *Michael McCarthy* (1873), 4 A. J. R. 155. *Cf.* also *Regina* v. *Petersky* (1895), 4 B. C. 385, noted *infra*, p. 595; and Legislative Power in Canada, pp. 223-4.

CHAPTER V.

Legislative Powers of the Dominion Parliament and the Provincial Legislatures.

As Stated in the British North America Act.

It seems the only proper way to open the great subject of the distribution of legislative powers within Canada to set out in their entirety the two famous sections, 91 and 92, of the British North America Act.

91. 'It shall be lawful for the (King), by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act), the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

1. The Public Debt and Property.
2. The regulation of Trade and Commerce.
3. The raising of money by any mode or system of taxation.
4. The borrowing of money on the Public Credit.

5. Postal Service.

6. The Census and Statistics.

7. Militia, Military and Naval Service, and Defence.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping.

11. Quarantine and the establishment and maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.

13. Ferries between a Province and any British or Foreign Country, or between two Provinces.

14. Currency and Coinage.

15. Banking, Incorporation of Banks, and the issue of Paper Money.

16. Savings Banks.

17. Weights and Measures.

18. Bills of Exchange and Promissory Notes.

19. Interest.

20. Legal Tender.

21. Bankruptcy and Insolvency.

22. Patents of Invention and Discovery.

23. Copyrights.

24. Indians and Lands reserved for the Indians.

25. Naturalization and Aliens.

26. Marriage and Divorce.

27. The Criminal Law, except the Constitution of the Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The establishment, maintenance, and management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any matter coming within any of the Classes of Subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the legislatures of the provinces.'

92. ' In each province the legislature may exclusively make laws in relation to matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:—

1. The amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor.

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial purposes.

3. The borrowing of money on the sole credit of the province.

4. The establishment and tenure of Provincial Offices, and the appointment and payment of Provincial Officers.

5. The management and sale of the Public Lands belonging to the Province, and of the timber and wood thereon.

6. The establishment, maintenance, and management of Public and Reformatory Prisons in and for the Province.

7. The establishment, maintenance, and management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licenses, in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10. Local works and undertakings, other than such as are of the following classes:—

(*a*) Lines of Steam and other Ships, Railways, Canals, Telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province.

(*b*) Lines of Steamships between the Province and any British or Foreign Country.

(*c*) Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including procedure in civil matters in those Courts.

15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any Law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.

16. Generally all matters of a merely local or private nature in the Province.'

Such are the principal provisions of the British North America Act as to distribution of legislative power within Canada between the Dominion parliament and the provincial legislatures. They are supplemented by section 93, making special provision as to the power of each province, under certain restrictions, to make laws in relation to education; section 94 making provision for a possible desire in the future on the part of the provinces to bring about uniformity of all or any of the laws relative to property and civil rights therein; and section 95, providing for concurrent powers in the Dominion and the provinces to make laws in relation to Agriculture and Immigration. But, before dealing with any of the special powers thus enumerated, there are certain introductory remarks to be made, and certain general principles of interpretation established by the authorities to be pointed out.

CHAPTER VI.

PLENARY POWERS OF CANADIAN LEGISLATURES.

1. Not mere delegates of Imperial Parliament.—Neither the Dominion parliament nor provincial legislatures are, in any sense, delegates of, or acting under any mandate from, the Imperial parliament. When the British North America Act enacted that there should be a legislature for each province, and that its legislative Assembly should have authority to make laws for the province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from, or as agents of, the Imperial parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial parliament, in the plenitude of its power possessed, and could bestow. And so with the Dominion parliament with respect to those matters over which legislative authority is conferred, plenary powers of legislation are given as large, and of the same nature as those of the Imperial parliament itself. If it be once determined that the Dominion parliament or a provincial legislature has passed an Act upon any subject which is within its jurisdiction to legislate upon, its jurisdiction as to the terms of such legislation is as absolute as that of the Imperial parliament in the United Kingdom over a like subject.

For these statements we have the authority of repeated judgments of the Privy Council. The earliest of these is that of *Hodge* v. *The Queen,*[1] where their lordships illustrate what they thus lay down by holding that provincial legislatures have full authority to delegate their powers, whereas in the United States, the State legislatures are held to possess only a delegated power themselves, and, therefore, to be unable to delegate their powers to any other person or body. The Privy Council had in a previous case taken a similar view of the plenary nature of the powers of the Indian legislature,[1a] while in a subsequent one[2] in which they were dealing with the power of the legislature of New South Wales, they refer to these two prior decisions, and say: "These two cases have put an end to a doctrine which appears at one time to have had some currency that a colonial legislature is a delegate of the Imperial legislature. It is a legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or a delegate." Again, in the subsequent case of *Dobie* v. *Temporalities Board,*[3] their

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[1] (1883), 9 App. Cas. at p. 132. So again, *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick,* [1892] A. C. 437; *Attorney-General of Canada* v. *Cain,* [1906] A. C. 542, at p. 547. See, also, per Ritchie, C.J., in *City of Fredericton* v. *The Queen* (1880), 3 S. C. R. at p. 529; per Girouard, J., in *In re Criminal Code Sections relating to Bigamy* (1897), 27 S. C. R. at p. 490. Similarly as to executive powers, see *Attorney-General for Canada* v. *Cain,* [1906] A. C. 542.

[1a] *The Queen* v. *Burah* (1878), 3 App. Cas. 889.

[2] *Powell* v. *Apollo Candle Co.* (1885), 10 App. Cas. at p. 290.

[3] (1882), 7 App. Cas. at p. 146.

lordships say that within the limits prescribed to them by the British North America Act, provincial legislatures are supreme, and "there is really no practical limit to the authority of a supreme legislature except the lack of executive power to enforce its enactments." And, conformably with all this, in *Union Colliery Co.* v. *Bryden*,[4] their lordships say: "In assigning legislative power to one or the other of these parliaments" (*sc.* Dominion or provincial), "it is not made a statutory condition that the exercise of such power shall be, in the opinion of the Court of law, discreet. . It is the proper function of a Court of law to determine what are the limits of the jurisdiction committed to them; but when that point has been settled, Courts of law have no right whatever to enquire whether their jurisdiction had been exercised wisely or not."

Now it may well be doubted whether there are to be found in the judgments of any Court *dicta* more pregnant and far-reaching, or, if one may use such an expression of judicial utterances, more statesmanlike, than these utterances of the Privy Council as to the plenary character of colonial legislative powers. If the federal constitution contained in the British North America Act was to satisfy the requirements of future generations, and suffice for the rapidly expanding national life of this great country; if, as the minds of men open to the wider view, Canadians are to enjoy a political life as inspiring, as vivid, and as free, as that of the people of the United Kingdom, no other theory of legislative power in Canada could suffice. Yet the old idea of the inferior status of colonial legislatures has been slow in disappearing even from legal minds,—a survival of the days of Legislative Assemblies fettered in their actions by irresponsible Executives, and by Legislative Councils, the members of which were appointed by the Crown, and without complete control over the public revenues, or the civil list, or the regulation of trade and commerce.[5] It may be said, in truth, to have been certain very recent interferences with vested rights, far too arbitrary in the opinions of many people, by the Ontario legislature, which have at last made manifest the full force of the Privy Council judgments above referred to.[6]

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[4] [1899] A. C. 580, at pp. 584-5.

This supremacy of legislatures under our Constitution is, indeed, one of the points in which, in the words of the preamble of the British North America Act, it is a 'Constitution similar in principle to that of the United Kingdom.' For as Professor Dicey says, in his Law of the Constitution,[7] 'the sovereignty of Parliament is (from a legal point of view) the dominant characteristic of English political institutions.'

2. Imperial treaties.—A consideration of the plenary powers of our legislatures suggests the question whether an Act of the Dominion parliament or of a provincial legislature could be held void and unconstitutional merely because in conflict with an Imperial treaty, unless, of course, such treaty had been confirmed by Imperial statute. The question is, in truth, of small importance, for the Empire is held together, not by legal technicalities, but by the good sense and moderation, and national feeling of British people. It is little likely that the Dominion parliament would, at any time, persist in passing an Act at variance with an Imperial treaty, and if it did the Governor-General would, doubtless, reserve it to await His Majesty's pleasure, or if he failed to do that, the Imperial veto power would be available to save the situation. Provincial Acts might, however, conflict with Imperial treaties, and have, perhaps, done so in such matters as immigration. But as to these there is not only the Dominion veto power available, but the British North America Act, by section 132, especially provides:—

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[5] See Bourinot's Manual of the Constitutional History of Canada, ed., 1901, pp. 1-37.

[6] See *supra*, pp. 34-40.

[7] 3rd ed., at p. 37.

132. The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire towards foreign countries, arising under treaties between the Empire and such foreign countries.[8]

We have, however, no provision in our Constitution similar to Article VI. of the Constitution of the United States, which provides that 'All treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land.'[8a]

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[8] For a recent case of a provincial Act being held inoperative as against provisions of an Imperial treaty which had been sanctioned by a Dominion Act pursuant to its powers under this section, see *In re Nakane and Okazaka* (1908), 13 B. C. 370.

3. Power of legislatures to delegate their functions.—It follows from the plenary character of the powers of Canadian legislatures, that they have the same power which the Imperial parliament would have, under the like circumstances, to confide to a municipal institution or body of their own creation authority to make by-laws or regulations as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect; and, also, power to legislate conditionally, as, for instance, by enacting that an Act shall come into operation only on the petition of a majority of electors.[9] As to the former, the Privy Council observe, in *Hodge* v. *The Queen*,[10] that: "It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. . . It was argued at the Bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another or take the matter directly into its own hands.[10a] Their lordships do not think it necessary to pursue this subject further, save to add that, if by-laws or regulations are warranted, power to enforce them seems necessary and equally lawful." And so they held that the Ontario legislature had power to entrust to a Board of Commissioners authority to enact regulations, in the nature of by-laws and municipal regulations of a merely local character, for the good government of taverns; and, thereby, to create offences and annex penalties thereto, in the manner purported to be done by the Ontario Liquor License Act. But, of course, in the case of such legislatures with strictly limited jurisdiction, they can delegate no powers beyond those which they can directly exercise. And so in their later judgment on the Liquor Prohibition Appeal, 1895,[11] the Privy Council say:—" Until Confederation, the legislature of each province as then constituted could, if it chose, and did in some cases, entrust to a municipality the execution of powers which now belong exclusively to the parliament of Canada. Since its date, a provincial legislature cannot delegate any power which it does not possess; and the extent and nature of the functions which it can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the provisions of section 92, other than No. 8:" (' Municipal Institutions in the Province.')

[8a] On the general subject of Imperial control in Treaty matters, see Keith, op. cit., Vol. 3, pp. 1101-57. See, also, *ibid.*, Vol. 2, pp. 796 *et seq.*; and Legislative Power in Canada, pp. 256-9.

[9] Such conditional legislation was upheld by the Privy Council in *Russell* v. *The Queen* (1882), 7 App. Cas. at p. 835.

[10] (1883), 9 App. Cas. at p. 132.

[10a] It appears from the *verbatim* report of the argument in this case, reported Dom. Sess. Pap., 1884, Vol. 17, No. 30, p. 113, that in the course of it Sir Barnes Peacock observed: "Another difficulty which occurs to my mind is this, that these resolutions or laws or whatever they may be called, would not require the assent of the Lieutenant-Governor, whereas if they were passed by the legislative Assembly, they would require that assent." And Sir Horace Davey, as he then was, met this objection as follows, to the complete satisfaction, apparently, of the Board:—"I answer that the Lieutenant-Governor, when he assented to the Act by which these commissioners were empowered to make rules and regulations, consented to the rules and regulations which they might make, and it is just the same as if the enactments were in this form, 'it shall be an offence against the law of the province to commit any infraction of the rules and regulations to be made by the commissioners.' The Lieutenant-Governor assented to that, and impliedly he assented to the infraction of these rules and regulations being treated as an offence against the law of the province, in just the same way as when Her Majesty assented to the Act of Parliament by which the judges were empowered to frame rules of procedure, she assented to these rules of procedure, when framed by Her Majesty's judges, being part of the law of the land . . When Her Majesty assents to a law empowering a body to make rules and regulations for carrying general legislation into execution and detail, the Crown authorises those, and gives its assent to legislation in this form, that these rules and regulations shall have the force of law, or that any infringement of the rules and regulations to be made by the body shall be an offence against the law and shall be punishable accordingly." And, perhaps, this is as good a place as any to refer to the words of Lord Watson on the argument in *Canadian Pacific R. W. Co.* v. *Bonsecours*, [1899] A. C. 367 (see *verbatim* report): "The Dominion cannot give jurisdiction, or leave jurisdiction, with the province. The provincial parliament cannot give legislative jurisdiction to the Dominion parliament. If they have it, either one or the other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or the other can enlarge the jurisdiction of the other or surrender jurisdiction." To which Lord Davey adds: "or curtail." And see *infra*, pp. 74-5.

So, of course, a provincial legislature can delegate to the Lieutenant-Governor in Council the power to make rules, regulations, and by-laws ancillary to carrying into operation the provisions of an Act. And legislation by one legislative body by reference to the enactments of another legislative body is defensible on the same principle.[12] Perhaps, by way of illustration, and as an example of delegation and legislation by reference in combination, it may be well to cite section 308 of the Dominion Railway Act, 1888. Certain railways having been declared to be works for the general advantage of Canada by Parliament, in 1883, and thereby brought under Dominion jurisdiction by virtue of section 92, item 10 (*c*) of the British North America Act,[13] it was enacted by the above section, that ' The Governor-General may, at any time, and from time to time, by proclamation or proclamations, confirm any one or more of the Acts of the legislature of any province of Canada, passed before the passing of this Act, relating to any railway which, by an Act of the Parliament of Canada, has been declared to be a work for the general advantage of Canada, and from and after the date of such proclamation the Act or Acts thereby declared to be confirmed shall be confirmed, ratified, and made as valid and effectual as if the same had been enacted by the Parliament of Canada.'

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[11] [1896] A. C. at p. 364.

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[12] *Cf.* Legislative Power in Canada, pp. 694-5. *Cf. Kerley* v. *London and Lake Erie Transportation Co.* (1912), 26 O. L. R. 588; and per Davies, J., in *Ouimet* v. *Bazin* (1912), 46 S. C. R. at p. 514. Reference may, however, be made to the opinion of the late Mr. Christopher Robinson, read in the Debate in the House of Commons on certain Bills relating to railways in Manitoba, on April 25th, 1901, as to whether it was *intra vires* for the Dominion parliament to authorise by statute an arrangement by which the province of Manitoba was to have power for a period of 30 years, to limit rates on part of the Canadian Northern Railway, a Dominion railway, parts of which were in Ontario. This part of the line in question covered about 290 miles in Ontario, and about 40 miles in Manitoba. In this opinion Mr. Robinson stated: 'What the British North America Act intended and provided for is that a Dominion road, such as the present, should be and remain under the exclusive control of the Federal parliament as regards rates and otherwise, so that the line as a whole should be so managed, and the rates as it from time to time regulated, as the circumstances affecting the whole line may appear to require . . . The Dominion, as it seems to me, should be free at all times to deal with the subject as a whole, and this they are precluded from doing by an enactment which for thirty years limits such rates on a particular portion not by their discretion, but by that of a provincial Executive. . . . It may be argued no doubt that this provision may at any time be repealed, so that the power is still kept in their hands; and even while it continues it is in effect only an enactment confirming in advance such rates as the provincial Executive may name, thus making them rates fixed by the Dominion. The answer would seem to be that the confirmation of the contract for 30 years cannot without bad faith be withdrawn: that the provision is not, in reality

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or in substance, an exercise by the Dominion of the powers entrusted to it through the province as its subordinate agent or representative, but an abdication of their authority in favour of the province; and that the right to enact cannot be given or affected by the powers to repeal, which is inseparable from all such legislation. It is to be remembered, also, that this is the transference of the Federal power to one of several provinces, which by the Constitution are excluded from all jurisdiction over the subject-matter, and extends to a portion of the line in another province, whose interests now or within the period of 30 years may be prejudicially affected by the action of Manitoba, against which the Federal authority is thus precluding itself from affording redress. It is in this view not so much a denial of provincial rights to refuse such legislation as in disregard of them to grant it. Such legislation appears to me to be opposed to the spirit and intention of our Constitution, if not beyond the powers given to it. . . It may be added that this is a question affecting not merely the immediate parties to the transaction, but that all whose interests are subject to our Constitution are entitled to assume that they will be dealt with in accordance with it, the due observance of the distribution of powers being in effect part of the compact in pursuance of which the British North America Act was passed.' The Dominion statute was, however, enacted: see I Edw. VII., c. 53, D.; and clause 8 of Sched. B. to the Act.

[13] As to such declarations and their effect, see *infra*, pp. 363-370.

4. Creation of new legislative bodies. — A further question which suggests itself in connection with the present subject is whether the Dominion parliament or a provincial legislature could create in Canada, and arm with general legislative authority within the limits of their respective spheres, a new legislative body not created or authorised by the British North America Act. Now it would seem that provincial legislatures certainly could, for under No. 1 of section 92, they can amend the Constitution of the province, except as regards the office of Lieutenant-Governor; and, as a matter of fact, under this provision, Manitoba, New Brunswick, and Prince Edward Island have abolished their Legislative Councils. And, as to the Dominion parliament, when, in the argument before the Privy Council, in *Fielding* v. *Thomas,*[14] counsel observed: "The Canadian parliament has no power at all, given to it, to alter the Constitution of Canada," Lord Davey, as we shall presently see, said: "that is a big question that it would be unwise to express any opinion upon. There is 'peace, order, and good government of Canada.'"[15] And it cannot be said that so to create a new legislative body would either in the case of the Dominion parliament, or the provincial legislatures, be a permanent and irrevocable abdication of functions. They would remain invested with the responsibility for what they had done; and the Dominion parliament could not, it may be, override section 20 of the British North America Act, which provides that there shall be a session of the parliament of Canada once, at least, in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session; nor the legislatures of Ontario and Quebec the provisions of section 86, that there shall be a session of those legislatures once at least in every year. We are here, however, dealing with matters not covered by judicial decisions, and with questions which, perhaps, may never arise for determination.[15a]

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[14] [1896] A. C. 600.

[15] MS. transcript from Cook and Kight's notes, p. 23; *infra*, p. 92.

5. Law Courts are not concerned with motives.—It is, again, obviously corollary to the plenary nature of legislative power in Canada that if the Dominion parliament or a provincial legislature legislates strictly within the powers conferred in relation to matters over which the British North America Act gives them exclusive legislative control, Courts have no right to enquire what motive induced them to exercise their powers.[16] Even if the legislature avow on the face of an Act that it intends thereby to legislate in reference to a subject over which it has no jurisdiction; yet, if the enacting clauses of the Act bring the legislation within its powers, the Act cannot be considered *ultra vires*. Nevertheless, the object and design of an Act may, as we shall presently see, be one of the things to be determined in order to ascertain the class of subjects of legislation to which it really belongs.[16a] All we are stating now is that, assuming that an Act, the constitutionality of which is in question, comes within one or other of the legislative powers conferred by sections 91 and 92 of the British North America Act, as the case may be; then, the motive which induced the legislature to exercise its power cannot be considered.

[15a] As to the legislative power of the provinces over particular lands in the province being transferred to the Dominion, see *Burrard Power Co.* v. *The King*, [1911] A. C. 87.

[16] See for illustrative cases generally Legislative Power in Canada, pp. 273-278.

6. Colourable legislation. — The parliament of Canada cannot, under colour of general legislation, deal with what are provincial matters only; and conversely, provincial legislatures cannot, under the mere pretence of legislating upon one of the matters enumerated in section 92, really legislate upon a matter assigned to the jurisdiction of the parliament of Canada. What is here referred to is legislation ostensibly under one or other of the powers conferred by the British North America Act on the enacting body, but, in truth and fact, relating to some subject which is not within the jurisdiction of that body. There appear to be few reported cases in which a Court has actually held an Act to be merely colourably constitutional in this sense, but *Attorney-General for Quebec* v. *Queen Insurance Co.*,[17] is such a case. There the Privy Council held, that a certain Quebec Act, entitled an Act to compel assurers to take out a license, and which purported to be, on the face of it, an exercise of the power conferred by No. 9 of section 92 of the British North America Act, to make laws in relation to shop, saloon, tavern, auctioneer, and other licenses, was not in substance, a License Act at all, but a simple Stamp Act on policies, and was indirect taxation, and *ultra vires.* Their lordships again, incidentally, refer to the subject in *Russell* v. *The Queen,*[18] where they observe, referring to the Canada Temperance Act, 1878, then under discussion: " There is no ground or pretence for saying that the evil or vice struck at by the Act in question is local, or exists only in one province, and that Parliament, under colour of general legislation, is dealing with a provincial matter only. It is, therefore, unnecessary to discuss the considerations which a state of circumstances of this kind might present. The present legislation is clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion."

[16a] *Infra*, p. 210 *et seq.*

[17] (1878), 3 App. Cas. 1090.

And in much the same way in *Colonial Building and Investment Association* v. *Attorney-General of Quebec,*[19] where their lordships held, that the mere fact that a Dominion company chose to limit its operations to one province only, did not invalidate its charter, they say: " It is unnecessary to consider what remedy, if any, could be resorted to if the incorporation had been obtained from Parliament with a fraudulent object, for the only evidence given in the case discloses no ground for suggesting fraud in obtaining the Act," (*sc.* of incorporation);[19a] the case here suggested apparently being one in which Parliament had been induced—while ostensibly exercising its proper power of incorporating Dominion companies—to, in fact, incorporate a company with a provincial object, thus infringing upon the exclusive jurisdiction of the provinces under No. 11 of section 92 of the British North America Act.

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[18] (1887), 7 App. Cas. at pp. 841-2.

[19] (1883), 9 App. Cas. at p. 165.

In this connection, too, may be cited the judgment of the Privy Council in *Union Colliery Co.* v. *Bryden,*[20] in which, as they themselves say, when distinguishing it in *Cunningham* v. *Tomey Homma*[21]: " This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were, in truth, devised to deprive the Chinese, naturalised or not, of the ordinary rights of the inhabitants of British Columbia, and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province."

And in the verbatim report of the argument before their lordships in that case,[22] occurs an interesting passage bearing upon this matter:—

[19a] The judges will not entertain allegations that a private Act was obtained by fraud or improper practices. If parliament has been deceived, the remedy is with parliament alone; *Lee* v. *Bude and Torrington R. W. Co.* (1871), L. R. 6 C. P. at p. 582.

[20] [1889] A. C. 587.

[21] [1903] A. C. at p. 157. See for other decisions, Legislative Power in Canada, pp. 372-381.

[22] Transcript from Shorthand Notes of Martin, Meredith and Henderson.

Mr. Blake:—"I agree that where a legislature has an absolute jurisdiction it is no use looking at its motives. I agree that where it has no jurisdiction it is no use looking at its motives. But, I say, where it has a limited, or qualified jurisdiction, you have to find out what it was really doing in order that you may determine whether it is within that limited jurisdiction."

Sir Edward Fry:—"You spoke of *bona fide* legislation. I do not understand what is *bona fide* and *mala fide* legislation."

Mr. Blake:—"Colourable legislation."

Sir Edward Fry:—"If it does accomplish an object which it cannot accomplish I suppose it falls. Surely it is not a question of good faith."

Mr. Blake:—"I am afraid it is necessary, where a legislature has a limited or qualified jurisdiction, to look at it a little differently from what at first sight one is disposed to look at Acts of an absolutely omnipotent Parliament."

Lord Watson:—"I never saw such a qualification. Supposing they were empowered to pass an Act in the interests of Chinese aliens, I do not think the Court would permit them, under the power of that Act, to pass a statute that was obviously and admittedly against the interests of every Chinaman in Canada. I suppose, an impossible thing."

Mr. Blake:—"Quite so. Your lordships would practically be considering whether, although the legislature said this was in the interests of Chinese aliens, it really was so."

Sir Edward Fry:—" I suppose we must look at the substance of the legislation."

Mr. Blake:—" Yes. I think it will be found that it will be impossible, efficiently, to deal with the question of a legislature having a qualified power, unless one looks more narrowly into the real substance of the legislation, than is necessary otherwise."

Another curious point, in this connection, is suggested by Mr. Blake in this same argument, namely: Whether provincial legislation may be *ultra vires* because it is attempting to produce, piecemeal, an aggregate result which is *ultra vires*:—

Mr. Edward Blake:—" I have stated in my Case the series or portions of series of statutes from which your lordships find the general course of legislation. It does not seem to me that it would be possible to ignore the aggregate result of a number of separate Acts of Parliament as bearing upon the question as to whether each one of those Acts of Parliament might be within the jurisdiction—if the aggregate result would be such as your lordships would hold to be outside the jurisdiction. Else it might be said that we might produce a general result by separate steps, which general result it would be impossible for them to produce otherwise."

Lord Watson:—" I suppose you would say that, if they could prohibit a Chinaman working in a mine they could prohibit him working in a bakery or factory, and so on until they left him with nothing to do, and if you could do it in one province you could do it in all."

Mr. Haldane, however, seems to satisfactorily deal with the point later on in the argument, when he says: "I respectfully say I cannot decide, any more than the people of old, the question of how many grains it takes to make a heap. You must see your heap and then judge whether, taking it as a whole, it is a heap. I am dealing with this particular grain, and I say this, at least, is not a heap."[22a]

But that, if the Dominion parliament or the provincial legislatures, have no power to legislate directly upon a given subject-matter, neither may they do so indirectly, is a principle which has been recognised in many provincial decisions;[23] and received the imprimatur of the Privy Council in *Madden* v. *Nelson and Fort Sheppard R. W. Co.*[24] There their lordships, referring to the contention that, if a provincial legislature did not directly enact that a Dominion railway must fence their railway line, but only that, if they did not, they should be responsible for cattle killed thereon, the provincial legislation might be valid, say: "Their lordships are not disposed to yield to that suggestion, even if it were true to say that this statute was only an indirect mode of causing the construction to be made, because it is a very familiar principle that you cannot do that indirectly which you are prohibited from doing directly."

[22a] *Cf. dicta* of Hagarty, C.J.O., in *Clarkson* v. *Ontario Bank* (1888), 15 O. A. R. at p. 181, to the effect that a legislature cannot by piecemeal in separate Acts legislate in relation to matters which it could not deal with as a whole in one Act.

[23] See Legislative Power in Canada, pp. 386-392.

[24] [1899] A. C. 626, at pp. 627-8.

It should not, however, apparently be deemed in any way necessarily a device to make unconstitutional legislation colourably valid, for a legislature to insert in its enactments such cautionary phrases as 'in matters within the legislative jurisdiction of the province,' 'so far as this legislature has power thus to enact,' 'subject always to the royal prerogative as heretofore,' etc.; nor is the Court in such cases called upon by analysis or criticism of possible powers and functions, which may be embraced in the words used, to discriminate as to what are within and what without the scope of the enactment; any particular case is to be dealt with as and when it arises. If no attempt has been made to act upon or enforce enactments thus guarded, it would seem premature to ask for a declaration of their invalidity.[25]

7. Law Courts not concerned with justice of legislation.—Again, it is not competent for any Court, when once an Act is passed by either the Dominion parliament or a provincial legislature, in respect to any matter over which it has jurisdiction to legislate, to pronounce the Act invalid because it may affect injuriously private rights, any more than it would be competent for the Courts in England, for the like reason, to refuse to give effect to a like Act of the parliament of the United Kingdom. If the subject be within the legislative jurisdiction of the parliament, and the terms of the Act be explicit, effect must be given to it, so long as it remains in force in all Courts of the Dominion, however private rights may be affected.[26] The Privy Council decision in the early case of *L'Union St. Jacques* v. *Belisle,*[27] really established this. There, it appeared, that the by-laws of the Union fixed the relief to be given to its members and the class of beneficiaries to receive it, amongst whom were, during their widowhood, the widows of deceased members of a certain standing in the Society. An Act of the legislature of the province, wherein the Union was incorporated, in their lordships' words "taking notice of a certain state of embarrassment resulting from what it describes, in substance, as improvident regulations of the Society, imposed an enforced commutation of their existing rights upon two widows." Nevertheless, they held that the Act was *intra vires.* In another, and much more recent case, which went to the Privy Council,[28] it appeared that the British Columbia legislature had, in 1883, granted, by statute, the land in question, with its mines and minerals, to the Dominion Government in aid of the construction of the Esquimalt and Nanaimo Railway Company, and that, in

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[25] See *Attorney-General of Canada* v. *Attorney-General of Ontario* (1890), 20 O. R. at p. 246; 19 O. A. R., at p. 38.

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[26] See Law of Legislative Power in Canada, pp. 279-288, and especially the *dicta* of the Privy Council in the Fisheries Case, [1898] A. C. at p. 473; *Hodge* v. *The Queen* (1883), 9 App. Cas. at pp. 131-2; and *Liquidators of the Maritime Bank* v. *Receiver-General of New Brunswick*, [1892] A. C. at pp. 441-2.

[27] (1874), L. R. 6 P. C. 31.

[28] *McGregor* v. *Esquimalt and Nanaimo R. W. Co.*, [1907] A. C. 462. *Cf.* also *Florence Mining Co.* v. *Cobalt Lake Mining Co.*, [1909] 18 O. L. R. 275, affirmed by the Privy Council, March 18th, 1910, 102 L. T. 375, where their lordships especially say that they "see no reason to differ from the conclusion of the Court below" on the point of legislative power. See, too, *McNair* v. *Collins* (1912), 27 O. L. R. 44.

1887, the Dominion Government granted it to the railway company. In 1904, however, the British Columbia legislature passed an Act declaring that a grant in fee simple, without any reservation as to mines and minerals, should be issued to certain settlers therein defined, and a grant was made to the appellant of the same land. The Privy Council held, that the Act of 1904, on its true construction, legalised the grant thereunder to the appellant, and superceded the title of the railway company, and was *intra vires.* The land, of course, had ceased to be the property of the Dominion in 1887. And now in the very recent *Alberta and Great Waterways Case,*[28a] their lordships say: " Their lordships are not concerned with the merits of the political controversy which gave rise to the statute the validity of which is impeached. What they have to decide is the question whether it was within the power of the legislature of the province to pass the Act."

Our legislatures, moreover, are not restricted by the limitations of what is called ' the right of eminent domain ' under the United States Constitution. Thus, the passage in Kent's Commentaries,[29] is quite inapplicable to them, where it is written: ' If it (the legislature) should take it (private property) for a purpose not of a public nature, as if the legislature should take the property of A. and give it to B.; or if they should vacate a grant of property, or of a franchise, under the pretext of some public use or service, such cases would be gross abuses of their discretion, and fraudulent attacks on private right, and the law would be clearly unconstitutional and void.'' Neither have we, in our constitution, anything like the provisions of the United States Constitution, that ‘no State shall . . . pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts ’; and that, as to Congress itself, ‘no bill of attainder or *ex post facto* law shall be passed.’ All of which forcibly brings out the difference between the sovereign powers of Canadian legislatures when legislating on the subjects committed to their jurisdiction, and the limited powers of legislatures in the United States.

[28a] *Royal Bank* v. *The King*, [1913] A. C. 283. See *infra*, pp. 504-9.

[29] 12th ed., Vol. 2, at p. 340.

CHAPTER VII.

SOME INTRODUCTORY REMARKS AS TO THE DISTRIBUTION OF LEGISLATIVE POWER WITHIN CANADA.

1. Generality of language used.—It will be observed that the framers of the British North America Act, in providing for the distribution of legislative power within Canada, were careful to use only very general language, containing in principle the conferred powers, but leaving to future legislation and judicial interpretation the task of completing the details. As has been very well said by a British Columbia judge:[1] "The Constitution Act of Canada only lays down broad, but distinct well-guarded principles and lines of demarcation, between the different legislative powers of separate legislative bodies, sometimes over the same subject, leaving these principles to be applied from time to time, according to the ever-varying growth and changes in the subjects of legislation incident to a new and progressive country. . . We must not expect to find that an organic Act of this kind will attempt to specify particularly even all the general heads of the subjects on which either Dominion or local legislatures can be expected to legislate. It would require omniscience to foresee what in the course of time may arise to call for legislative interference. All that the framers of it could be expected to do would be what they have done in sections 91 and 92, lay down clear principles of distinction between the classes of subjects which were to be dealt with by the several legislatures, enunciate clear principles to guide them in their respective legislation, and compile the other sections of the Act with special, though inferential, reference to the guiding principles so laid down, and especially guarding against clashing of authority." To which may be added words of the same learned judge in another case,[2] that "it is natural that in the working out of such a Constitution in a new and growing country, questions should be continually cropping up, and call upon the Courts to define gradually and with greater exactness, as time progresses and population expands, the relative powers given by the Act to the Dominion and provinces respectively."

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[1] Crease, J., in *The Thrasher Case* (1882), 1 B. C. (Irving) at p. 209, 211.

It would, of course, have been impossible to make a complete enumeration of all the powers to be vested in the Dominion parliament and the provincial legislatures, but there is much more in the matter than that; and it would be a grave injustice to the framers of our Constitution to take so narrow a view. Mr. Dicey has pointed out that [3] the very inflexibility of a written Constitution is a temptation to the framers of one to include in it maxims, principles, and restrictions, which (though not in their nature constitutional), appear to them, at the time, to have special claims upon respect and observance. The framers of the British North America Act resisted this temptation, far more than did those of the United States Constitution.[4] As they state, in the preamble of the Act, they purposed to give to Canada 'a Constitution similar in principle to that of the United Kingdom'; and so they restrained their hands, and in the distribution of legislative powers, as in devising the other features of our Constitution, with consummate skill and wisdom, they allowed as free scope as in the nature of the case was possible, for that process of organic growth of the Constitution coincidently with the growth of the development of the national life generally, which is one great virtue of the Constitution of Great Britain. As a Quebec judge[5] concisely puts it: "The general terms employed show that the wish has been to give a general elasticity in our Constitution."

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[2] *Regina* v. *Wing Chong*, 2 B. C. (Irving), at p. 156.

[3] Article on Federal Government, 1 L. Q. R. at pp. 86-7.

But, of course, this great object could only be attained at the cost of some ambiguity. As the Privy Council say in their recent judgment concerning references to the Supreme Court by the Governor-General in Council:[5a] "Numerous points have arisen, and may hereafter arise, upon those provisions of the Act which draw the dividing line between what belongs to the Dominion or to the province respectively. An exhaustive enumeration being unattainable (so infinite are the subjects of possible legislation), general terms are necessarily used in describing what either is to have, and with the use of general terms comes the risk of some confusion, whenever a case arises in which it can be said that the power claimed falls within the description of what the province is to have. Such apparent overlapping is unavoidable, and the duty of a Court of law is to decide in each particular case on which side of the line it falls in view of the whole statute. . . When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act."

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[4] See Legislative Power in Canada, pp. xlvi.-lxiv.

[5] Tessier, J., in *Poulin* v. *Corporation of Quebec* (1881), 7 Q. L. R. at p. 339.

[5a] *Attorney-General of Ontario* v. *Attorney-General of Canada*, [1912] A. C. at pp. 581, 583.

2. The General Scheme.—The scheme of the British North America Act, in respect to the subject now under consideration, comprises a four-fold classification of legislative powers: firstly, over those subjects which are assigned to the exclusive plenary power of the Dominion parliament; secondly, over those assigned exclusively to the provincial legislatures; thirdly, over two subjects, and two subjects only, which are assigned concurrently to the Dominion parliament and the provincial legislatures, namely, agriculture and immigration;[6] and, fourthly, over a particular subject, namely, education,[7] which, for special reasons, is dealt with exceptionally, and made the subject of special legislation. By section 91, the Imperial parliament unequivocally, but in general terms, declares its intention to be, to place under the jurisdiction of the Dominion parliament all matters excepting only certain particular matters assigned by the Act to the local legislatures. The 92nd section, therefore, instead of dealing with the subjects to be assigned to the local legislatures in the same general terms as had been used in the 91st section, by placing under the jurisdiction of those legislatures all matters of a purely local or private nature within the province (a mode of expression which would naturally lead to doubt and confusion, and would be likely to bring about that conflict which it was desirable to avoid), enumerates, under items numbered from 1 to 15 inclusive, certain particular subjects, all of a purely provincial, municipal, and domestic nature, that is to say, 'of a local or private character,' and then winds up with item No. 16, to prevent the particular enumeration of the 'local and private' matters included in items 1 to 15 being construed to operate as an exclusion of any other matter, if any there might be, of a merely local or private nature. But, inasmuch as certain of the items of federal jurisdiction enumerated in the 91st section, might be well considered to be matters which would come within some of the provincial subjects enumerated in the 92nd section, as, for example,

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[6] Section 95. 'In each province the legislature may make laws in relation to Agriculture in the province, and to Immigration into the province; and it is hereby declared that the Parliament of Canada may from time to time make laws in relation to Agriculture in all or any of the provinces, and to Immigration into all or any of the provinces; and any law of the legislature of a province, relative to Agriculture or to Immigration, shall have effect in and for the province as long and as far only as it is not repugnant to any Act of the parliament of Canada.'

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[7] Section 93. See *infra* p. 630 *et seq.*

'bills of exchange and promissory notes,' and 'bankruptcy and insolvency,' within 'property and civil rights,' and so it might have been thought that provincial legislatures might legislate with regard to them provided they restricted the operation of such statutes to the province, whereas, in fact, the intention was to place within the power of the Dominion parliament all matters which, although they might appear to come within the description of provincial, or municipal, or 'local or private,' were deemed to possess an interest in which the inhabitants of the whole Dominion might be considered to be alike concerned—therefore, by a necessary and wise provision, the 91st section especially enacts that, 'notwithstanding anything in this Act, the exclusive legislative authority of the parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated.'[7a] The 91st section also expressly provides that the enumeration of classes therein contained is not thereby to 'restrict the generality' of the preceding extensive powers 'to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.'

3. The Dominion residuary power. — The great importance of that feature of the British North America Act whereby a general undefined and unrestricted power to make laws for the peace, order, and good government of Canada, in relation to non-provincial subjects, is vested in the Dominion parliament, is obvious. Its possible scope is by no means determined as yet. It has been suggested by no less a person than Lord Davey that by virtue of it, the Dominion parliament might, perhaps, even change the federal Constitution, though not, of course, the Constitutions of the provinces.[8] In the *Riel* case,[9] the Privy Council said that the words are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to, quite irrespective of the English common law or legislation. In another case they said that they fully authorised the Canada Temperance Act.[10] In yet another,[11] they say that the Dominion parliament does not derive jurisdiction from them to deal with any matter which is in substance local or provincial, and does not truly affect the interest of the Dominion as a whole; but, that " some matters, in their origin local or provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian parliament in passing laws for their regulation or abolition in the interest of the Dominion."

[7a] *Cf. City of Fredericton* v. *The Queen* (1880), 3 S. C. R. at pp. 562, 566 *et seq.*

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[8] See Legislative Power in Canada, p. 699, n. 1. In *Kerley* v. *Lake Erie Transportation Co.* (1912), 26 O. L. R. at p. 595, Boyd, C., says that it "means the exercise of large and liberal discretionary powers to be exercised for the well being of the community, and for the right working of the Constitution." There were one or two observations by members of the Board on the argument in the matter of Supreme Court references by the Governor-General: *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1912] A. C. 571, in reference to this clause, which are, perhaps, worth while recording here. Thus Lord Loreburn, L.C. (p. 101 *verbatim* report: Briggs, Toronto), says:—"It is not, I suppose, contended that the words 'peace, order, and good government' involve the faculty of re-writing the whole Constitution." And Lord Atkinson says (p. 156): "Must not any legislation that you pass under that be consistent with the different sections of the Act?"

Mr. Newcombe: "No doubt the whole Act must be taken together."

Lord Atkinson: "If they did not do that they could practically repeal all the sections."

And, again, at p. 169, Lord Atkinson says:—"Surely you cannot say that the legislature, under this power of 'peace, order, and good government,' can practically tear up the sections of the British North America Act."

And in the judgment itself, [1912] A. C. at p. 584, after referring to the clause in question, their lordships say:—"All depends upon whether such a power," (*sc.* a power to place upon the Supreme Court the duty of answering questions of law or fact when put by the Governor in Council) "is repugnant to the British North America Act."

[9] (1885), 10 App. Cas. 675.

The special significance of the word ' order,' in the phrase ' peace, order, and good government of Canada,' is, also, worthy of special notice. In the corresponding Quebec Resolution (No. 29) the words used were ' peace, welfare and good government,' which were also the words used in respect to the law-making powers in the Royal Proclamation of 1763,[11a] in the Quebec Act, 14 Geo. III., c. 3, s. 12; in the 'Constitutional Act ' of 1791, 31 Geo. III., c. 31, s. 2, and also in the Union Act of 1840, 3-4 Vict. c. 35, s. 3. It is clear therefore, that the substitution of the word ' order ' for welfare was done advisedly. It places in the hands of the federal power of the Dominion the right and responsibility of maintaining public order throughout the whole country. The want of a similar provision in the Constitution of the United States, has been described as 'the capital defect of the American Constitution, where the preservation of law and order is not, primarily FBI and directly, the affair of the Government of the United States.'[11b] The difficulties and now dangers resulting therefrom were illustrated by the great railway strike disturbances in Chicago in the summer of 1894. See further, as to this Dominion residuary power, *infra,* p. 99 *et seq.*

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[10] *Russell* v. *The Queen* (1882), 7 App. Cas. 836.

[11] [1896] A. C. at p. 361. And see as to this *infra*, pp. 136-8, 169.

[11a] For this Proclamation see Houston's Constitutional Documents of Canada, p. 67; Cart. Cas., Vol. 3, at p. 449n.

4. Distribution of legislative power between Dominion and provinces is exhaustive. — It is clear, then, from the sections of the Federation Act relating to the distribution of legislative power to which reference has been made, that they exhaust the whole range of legislative power, so far, at any rate, as the internal affairs of Canada are concerned, and that whatever is not thereby given to the provincial legislatures rests with the Dominion parliament. And so, in their very recent judgment in respect to references by the Governor-General in Council to the Supreme Court,[12] the Privy Council say: "There can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand, and the provinces on the other hand, cover the whole area of self-government within the whole area of Canada. It would be subversive of the whole scheme and policy of the Act to assume that any point of internal self-government is withheld from Canada.'' But herein lie two important points of difference between our Constitution and that of the United States. Under the latter there is a residuum of powers neither granted to the Union nor continued to the States, but reserved to the people, who, however, can put them in force only by the difficult process of amending the Constitution. Consequently, many possible laws no legislature in the United States has power to pass. The scheme of our Federation Act was to have no reserved power; but that there should be, in Canada, the same kind of legislative power as there is in the British parliament, so far as that was consistent with the confederation of the provinces and our position as a Dominion within the Empire. Under the British Constitution, no legislative power exists in the people alone at all, but such wholly exists in the King, Lords, and Commons, and the concurrence of these alone can express the supreme will of the nation, and there is no limit to their power of legislation. Here then, again, the framers of the British North America Act have been faithful to the statement in the preamble of the Act, that it was passed to carry out the expressed wish of the legislatures of the different provinces of Canada, that they should be federally united 'with a Constitution similar in principle to that of the United Kingdom.' And we can understand the meaning of what was well said by a British Columbia judge,[13] that in these sections of our Federation Act we have that distribution of legislative power which "may one day, though in the perhaps distant future, expand into national life."

[11b] The Spectator, July 14th, 1894.

[12] *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1912] A. C. 571, at p. 581.

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[13] *The Thrasher Case* (1882), 1 B. C. (Irving), at p. 195.

The second point of contrast with the Constitution of the United States is that with us all powers of legislation not expressly assigned to the provincial legislatures, are vested in the Dominion parliament, whereas in the Constitution of the United States, as expressed in the 10th Amendment: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' This has been, again and again, pointed out in the cases as a leading distinction between the two Constitutions. The intention of the framers of our Constitution, who had before them the melancholy warfare which had so long desolated so large a portion of this Continent, was, no doubt, as a Quebec judge has said,[14] that "the general Legislature should be stronger, far stronger than the federal Legislature of the United States—in relation to the States Governments."

There is, then, no possible kind of legislation relating to the internal affairs of Canada, which cannot be enacted either by the Dominion parliament or by the provincial legislatures. If the subject-matter of an Act is not within the jurisdiction of the provincial legislatures, acting either severally or in concert with each other, it is within the jurisdiction of the Dominion parliament; while, on the other hand, if the subject-matter of an Act, other than agriculture or immigration, is within the jurisdiction of the Dominion parliament, it is not (in its entirety) within the jurisdiction of the provincial legislatures, whether acting severally or in concert with each other, although some of the provisions of such Act, ancillary to the main subject of legislation, may, as we shall see, be within such provincial jurisdiction. In the case of *Valin* v. *Langlois,*[15] the Privy Council based their reasoning upon the fact that "that which is excluded by the 91st section of the British North America Act is not anything else than matters coming within the classes of subjects assigned exclusively to the legislatures of the provinces." And, in the later case of *Bank of Toronto* v. *Lambe,*[16] their lordships state that they adhere to the view "which has already been taken by this Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the Parliament." But as a Supreme Court judge has recently pointed out,[17] this does not mean that there must be found vested in one single authority, the power to legislate wholly with regard to a given subject, e.g., through traffic passing first over a provincial railway, and then over a federal railway with which the provincial railway connects. And, in like manner, in their recent judgment in *City of Montreal* v. *Montreal Street Railway,*[17a] where the question was the power of the Dominion parliament when legislating respecting a federal railway to also legislate respecting the through traffic passing over a provincial railway which connected with it, the Privy Council say: "One of the arguments urged on behalf of the appellants was this: The through traffic must, it is said, be controlled by some legislative body. It cannot be controlled by the provincial legislature because that legislature has no jurisdiction over a federal line, therefore it must be controlled by the legislature of Canada. The answer to that contention is this, that so far as the 'through' traffic is carried on over the federal line, it can be controlled by the parliament of Canada, and that so far as it is carried over a non-federal provincial line, it can be controlled by the provincial legislature, and the two companies who own these lines can thus be respectively compelled by these two legislatures to enter into such agreement with each other as will secure that this 'through' traffic shall be properly conducted; and further that it cannot be assumed that either body will decline to co-operate with the other in a reasonable way to effect an object so much in the interest of both the Dominion and the province as the regulation of ' through ' traffic."

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[14] Torrance, J., in *Angers* v. *Queen Ins. Co.* (1877), 21 L. C. J. at p. 80. *Aliter* in Australia: Constitution Act, secs. 106, 107.

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[15] (1879), 5 App. Cas. at p. 119.

[16] (1887), 12 App. Cas. at p. 588.

[17] Duff, J., in *Canadian Pacific R. W. Co.* v. *Ottawa Fire Ins. Co.* (1907), 39 S. C. R. at p. 465. On December 5th, 1912, in the House of Commons, in answer to the question: 'What portions of the Dominion of Canada are solely under Federal control and jurisdiction' the Minister of Justice replied—"The territory which remains subject to the legislation of the Dominion and not subject to any provincial powers, is comprised in the North-West Territories and the Yukon Territory, being all that part of the Dominion not included within the boundaries of any province:" Newspaper report.

[17a] [1912] A. C. 333, at p. 346.

5. Extent and scope of Dominion residuary power.—Reverting to the subject of the residuary power conferred upon the Dominion parliament to make laws for the peace, order, and good government of Canada in relation to non-provincial subjects, as has been already intimated,[17b] judicial decisions have, by no means as yet, worked out its full meaning and scope. As the Judicial Committee themselves say, in *City of Montreal* v. *Montreal Street Railway,*[17c] it was laid down in their previous judgment on the Liquor Prohibition Appeal, 1896,[17d] with regard to this residuary power of the Dominion parliament that—" (1) sections 91 and 92 of the British North America Act indicate that the exercise of legislative power by the parliament of Canada in regard to all matters not enumerated in section 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any classes of subjects enumerated in section 92; (2) that to attach any other construction to the general powers which, in supplement of its enumerated powers, are conferred upon the parliament of Canada by section 91, would not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces; and (3) that if the parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject upon which it might not legislate to the exclusion of provincial legislation.'' And they held that these principles established that the invasion of the rights of the province which the Railway Act and Order of the Commissioners, in the case before them, necessarily involved in respect to one of the matters enumerated in section 92, namely, legislation touching local railways, could not be justified on the ground that this Act and Order concerned the peace, order, and good government of Canada.[17e]

[17b] *Supra*, p. 92.

[17c] [1912] A. C. at pp. 343-4.

[17d] *Attorney-General of Ontario* v. *Attorney-General of the Dominion*, [1896] A. C. 348. See also, *infra*, pp. 136-8.

It is by no means clear that the view expressed in some cases that the Dominion parliament's action in this field is subject to the express provisions of the British North America Act itself, will be ultimately sustained, save, of course, as to the provisions which confer upon the provinces their exclusive powers, one of which is the amendment of the Constitution of the province, except as regards the office of Lieutenant-Governor. No doubt, it may be asked, how can the Dominion parliament have the power to amend the Imperial Act which established it? The only possible answer would be, if such power it has,—'' because the Imperial Act, which constituted it, gave it the power." So we come back to the question, does the power to make laws for the peace, order, and good government of Canada, in relation to non-provincial subjects, include even this, or does it not?[17f]

[17e] See further as to this case of *City of Montreal* v. *Montreal Street Railway*, [1912] A. C. 333, *infra*, pp. 344-6.

Extra-territorial legislation.—Again, it is no doubt true, as a general statement, that the Dominion parliament cannot legislate except for Dominion territory, just as a great English judge said of Imperial statutes in a famous case: "The statutes of this realm have no power, are of no force, beyond the Dominions of Her Majesty, not even to bind the subjects of the realm, unless they are expressly mentioned, or can be necessarily implied."[18] But this does not affect the power of the Imperial parliament to give the legislatures of self-governing Dominions within the Empire, the power to pass statutes which shall operate outside their borders, though within those of the Empire itself. And the powers conferred upon the Australian Federal parliament by the Commonwealth of Australia Constitution Act, 1900, suggest that no narrow construction should be given to this residuary Dominion power, for we find (section 51), power conferred there to make laws for the peace, order, and good government of the Commonwealth with respect to 'fisheries in Australian waters beyond territorial limits,'[19] 'external affairs,' and 'the relations of the Commonwealth with the islands of the Pacific'; in connection with which is also to be noted the provision (section 5) that 'the laws of the Commonwealth shall be in force on all British ships, the (King's) ships of war excepted, whose first port of clearance and whose port of destination, are in the Commonwealth.'[20] The question of the power of the legislatures of the self-governing Dominions to legislate extra-territorially within the Empire, would seem, after all, to be merely a question of the construction of the Constitution which the Imperial Government or parliament has conferred upon them respectively. It is, moreover, still a moot question whether colonial statutes, purporting to have an extra-territorial operation, are, nevertheless, not valid and binding within the territory and upon the Courts of the lawmaker, unless repugnant to some Act of the Imperial parliament; it being quite a different question whether foreign Courts will recognise them, and judgments obtained in legal proceedings initiated under them.[21]

[17f] For expression of an opinion adverse to the possession of any such power by the Dominion parliament (not, however, confirmed by the Law Officers of the Crown in England) see the Memorandum by the late Sir John Bourinot, in special reference to whether Parliament had power to provide for the appointment of a Deputy Speaker of the Senate: Hodgins' Prov. Legisl. 1867-1895, App. B., pp. 1314-1323. See, also, Keith's Responsible Government in the Dominions, Vol. 2, pp. 771-6.

[18] *Jeffrey* v. *Boosey* (1854), 4 H. L. R. at p. 939. See, also, *supra*, p. 51, n. 1.

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[19] This power had been possessed by the Federal Council of Australasia since 1885. 'It is not perhaps without interest that the Hague Tribunal, in the case of the North American fisheries dispute, have clearly shown their recognition of the right of the three parliaments of the United Kingdom, Canada, and Newfoundland to express the sovereign power of the Empire to make regulations regarding the fishery on the coast—a significant rejoinder to the attempts once pressed by the Government of the United States that the Imperial parliament and Government alone could make regulations affecting the treaty rights of the United States in North America:' Article on Legal Interpretation of the Constitution of the Commonwealth, Jl. of Comp. Legisl., N.S. Vol. XI., p. 238.

[20] As to these powers see an article by Professor Harrison Moore in 16 L. Q. R. at pp. 38-40; the last mentioned power had also been possessed by the Federal Council of Australasia since 1885. For some cases upon the question of extra-territoriality as a ground of objection to Colonial statutes, see, also, Law of Legislative Power in Canada, pp. 321-338.

Moreover, bearing in mind the fact that, as we shall see, the powers of the Dominion parliament, as also of the provincial legislatures, are as plenary and ample within the limits prescribed by the British North America Act as the Imperial parliament, in the plenitude of its power possessed and could bestow, and that the expressed intention was to confer upon the Dominion a constitution similar in principle to that of the United Kingdom, it seems beyond question that they must have the same power to bind their own subjects everywhere, as the Imperial parliament has to bind

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[21] See *Asbury* v. *Ellis*, [1893] A. C. 339; *Rex* v. *Meikleham*, (1905) 11 O. L. R. 366; per Boyd, C., in *Regina* v. *Brierly* (1887), 14 O. R. at p. 531; per Sedgewick, J., in *In re* Criminal Code Sections relating to Bigamy (1897), 27 S. C. R. at p. 482; and, generally, Law of Legislative Power in Canada, pp. 321-338. In *Rex* v. *Meikleham* (1905), 11 O. L. R. 366, it is pointed out that, although it is no doubt a rule of international law that there is no municipal jurisdiction—using that expression in its broad sense—to interfere with persons on board a foreign vessel navigating the high seas, and the Great Lakes had in *Regina* v. *Sharp* (1869), 5 P. R. 135, been held to form part of the high seas, yet where it is plain that the legislature has intended to disregard or interfere with that rule, the Courts are bound to give effect to its enactments. See this case referred to also *infra* p. 184, n. 1. As to the deportation and expulsion of aliens, paupers, and others, see *Attorney-General of Canada* v. *Cain*, [1906] A. C. 542, and *infra*, p. 303, n.

British subjects everywhere.[22] For the expression 'subject of a colony' has high judicial authority,[23] and, perhaps, may be taken to mean

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[22] See *In re* Criminal Code Sections relating to Bigamy (1897), 27 S. C. R. 461. *Cf.*, however, an article on Extra-territorial Criminal Legislation of Canada, by Frank A. Anglin, in which he arrives at a contrary conclusion: 19 C. L. T. at pp. 1, 38. And see the Despatch of the Secretary of State for the Colonies of December 17th, 1869, objecting to the Dominion Act, 32-33 Vict. c. 23, s. 3, purporting to make any person who wilfully and corruptly makes a false affidavit or declaration out of Canada to be used in Canada, guilty of perjury and liable to be prosecuted in Canada, as *ultra vires*, because it assumed 'to affix a criminal character to acts committed beyond the limits of the Dominion': Hodgins' Prov. Legisl. 1867-1895, p. 7. It was amended by 33 Vict. c. 26, D., which confines the offence to making such false affidavit or declaration 'out of the province in which it is to be used, but within the Dominion of Canada.'

[23] That of Turner, L.J., in *Low* v. *Routledge* (1865), L. R. 1 Ch. 42, at pp. 46-7. The point decided there is that a colonial legislature cannot affect an alien's rights under an Imperial Act expressed to extend to the colonies. The plaintiff, an alien, temporarily resident in Montreal, claimed to be entitled to copyright under the Imperial Copyright Act, 5-6 Vict. c. 45, in respect to a book she was publishing in England and it was unsuccessfully contended that she could not be so entitled, because by a Canadian statute an alien coming into Canada for the purpose of publishing a work, as the plaintiff had done, and publishing his book there, would not be entitled to copyright in the work so published, and because an alien coming into Canada could acquire only such rights as were given by the law of Canada. In *Regina* v. *Brierly* (1887), 14 O. R. at p. 533, Boyd, C., says:—"*Quoad* Canada, and as to British subjects resident here, the parliament of Canada has the same authority as that possessed by the Imperial parliament with reference to British subjects throughout the realm." And see Keith *op. cit.* Vol. 3, pp. 1453-7. As to statutes authorising the initiation of legal proceedings against defendants out of the jurisdiction, see *Ashbury* v. *Ellis*, [1893] A. C. 339, 344; *Buchanan* v. *Rucker* (1898), 9 East 192; *Becquet* v. *McCarthy* (1831), 2 B. & Ad. 951; *Don* v. *Lippman* (1837), 5 Cl. & F. 1, at p. 21; *Sirdar & Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A. C. at p. 685; *Cavan* v. *Stewart* (1816), 1 Stark N. P. 525; *McCarthy* v. *Brener* (1896), 2 Terr. L. R. 230, 233; *Deacon* v. *Chadwick* (1901), 1 Q. L. R. 346, where it was held that a judgment obtained in one province by service of process out of the jurisdiction against a domiciled resident of another

British subjects domiciled in the colony. But in all this we are, as it were, looking forward beyond the stage which we have actually reached

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province, who had not in any way attorned to the jurisdiction, had no extra-territorial effect on the ground that no province can pass laws to operate outside its own territory, and no tribunal established by a province can extend its process beyond the province so as to subject persons or property elsewhere to its decisions; but that it would be otherwise where the rule or judgment of such other province had been obtained upon the non-resident's own application; and *Bank* v. *Orrell* (1878), 4 V. L. R. L. 219. See, also, an article on Extra-territorial Jurisdiction in this matter (1899), 19 C. L. T. at p. 185. A consideration of these cases, most of which are commented on in Legislative Power in Canada, at pp. 328-333, brings prominently into notice the distinction already referred to, between the question whether such statutes are valid and binding within the territory and upon the Courts of the law-maker, and the question whether foreign Courts will recognise them, and judgments obtained in legal proceedings initiated under them; and with regard to the latter question, the difference between the position of those who are in some sense subjects of the law-maker, and of those who are not. In a despatch of October 29th, 1874, to the Governor-General of Canada, quoted by Todd (Parl. Gov. in Brit. Col., 2nd ed., at p. 183), the Secretary of State for the Colonies wrote:—"It is obvious that if the intervention of Her Majesty's Government were liable to be invoked whenever Canadian legislation on local questions affect, or is alleged to affect, the property of absent persons, the measure of self-government conceded to the Dominion might be reduced within very narrow limits. It is to the Dominion government and legislature that persons concerned in the legislation of Canada on domestic subjects and its results must have recourse." But as to the legislature of a colony, in which an English company domiciled in England carries on business, being unable by legislation to affect the rights of preference shareholders, as between themselves and ordinary shareholders, under a contract entered into in England, as by imposing a duty in the nature of income tax on all dividends or interest paid out of assets in the colony to the members of the company, see *Spiller* v. *Turner*, [1897] 1 Ch. 911. In *Jones* v. *Twohey* (1908), 1 Alt. L. R. 267, 295, Beck, J., held that certain statutes in force in Saskatchewan providing that a chattel mortgage should be void as against creditors and subsequent purchasers unless registered, and requiring a sufficient description of the goods—"were effective only within the territory over which the in the organic development of this Dominion and the Empire at large.

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legislature which enacted them had jurisdiction, and were obviously and necessarily intended to protect creditors and subsequent purchasers seeking to enforce their claims within the same judicial territory; and hence that such registration was not necessary in order to preserve the validity of the mortgage as against creditors and subsequent purchasers seeking to enforce their claims in other jurisdictions," *e.g.*, in this case, in Alberta. As to a provincial legislature having no authority either to establish, vary, or declare the boundary line between it and another province, see report of Sir Oliver Mowat as Minister of Justice, of December 17th, 1896, on a New Brunswick Act purporting to enact what shall be the line of division between the provinces of New Brunswick and Nova Scotia: Hodgins' Prov. Legisl. 1896-8, p. 48.

CHAPTER VIII.

CONCURRENT JURISDICTION.

With the exception of agriculture and immigration, legislation in relation to which is specially provided for by section 95 of the British North America Act, there is no subject-matter over which there can (speaking strictly) be said to exist concurrent powers of legislation in the Dominion parliament and the provincial legislatures. And yet, this must not be taken to mean that, if any Act is *intra vires* of the Dominion parliament, a precisely similar Act could under no circumstances be *intra vires* of a provincial legislature. For, as we shall see,[1] subjects which in one aspect and for one purpose fall within section 92, may, in another aspect and for another purpose, fall within section 91 of the British North America Act; and if the subject-matter dealt with comes within the classes of subjects assigned to the parliament of Canada, there is no restriction upon its passing an Act which will affect one part of the Dominion and not another; and, consequently, it seems quite possible that a particular Act, regarded from one aspect, might be *intra vires* of provincial legislature, and yet, regarded from another aspect, might be also *intra vires* of the Dominion parliament.. What is properly to be called the subject-matter of the Act may depend upon what is the true aspect of the Act.[1a] An Ontario

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[1] *Infra*, pp. 199-209.

[1a] Wilson, J., in *Reg.* v. *Taylor* (1875), 36 U. C. R. at p. 206.

Act, concerning bills of lading, and giving consignees and endorsers the same rights, and imposing on them the same liabilities as if the contract had been made with them, has been held *intra vires* as dealing only with property and civil rights, although the Dominion parliament might also have passed a similar Act as a necessary and convenient matter to be dealt with in the regulation of trade and commerce.[2] But whether or not there could be a case of an Act which, in its entirety, both Parliament and the provincial legislatures could constitutionally pass, it certainly must not be supposed that Parliament and the provincial legislatures can, for no purpose whatever, or under no circumstances whatever, legislate in relation to the same matter. In some directions the jurisdictions of the provinces and of the Dominion may overlap. Thus, the fact that the Dominion parliament can declare anything a crime, will not, it would seem, exclude the powers of the province to deal with the same thing in its civil aspect, and to impose sanctions for the observance of the law, as, for example, in the matter of providing against frauds in the supplying of milk to cheese factories.[3] In the cases from which the last example is derived, the subject-matter of the two Acts was not, strictly speaking, the same. That of the Dominion Act was a crime, it was a criminal law passed in the interests of the general public; that of the Ontario Act was rather the regulation of the mode of carrying on a particular trade or business within the province, so as to secure fair and honest dealing between the parties concerned. Again, although, as the Privy Council have held,[4] the Ontario Act, to prevent the profanation of the Lord's Day, treated as a whole, is *ultra vires* as legislation upon criminal law, which is exclusively for the Dominion parliament, this does not necessarily mean that the provincial legislatures cannot pass Sunday Observance laws closing places of amusement, and prohibiting trading or industrial work on Sundays, as police regulations, in the sense of " regulations suggested by the special circumstances of particular localities, to promote the welfare and benefit of the public and the material, intellectual, and moral interests of the inhabitants.'"[5] And where the Dominion legislation is not on any matter which is expressly mentioned in the enumeration of section 91, but is under the general power to make laws for the peace, order, and good government of Canada, it does not, by any means, follow, that the provincial legislature cannot make a local law of a similar character, *e.g.*, temperance legislation. Moreover, when the legislative powers of the Dominion parliament and the provincial legislatures are said to be mutually exclusive, this must not be understood as meaning that legislation by the latter cannot be *intra vires* if it interferes with or even renders nugatory perfectly constitutional legislation by the former. As we shall see, in certain cases, local legislation may by indirect means render inoperative federal legislation, and *vice versa*.[5a] And so, of the legislative area given to the Dominion parliament by section 91 of the British North America Act, part is its own exclusively, but that area also may include, in addition, certain possible ancillary provisions which touch and trench upon the provincial law and jurisdiction; and, as long as there are enactments within the latter part of the Dominion area, they will exclude the right of the province to legislate in such a way as to destroy or derogate from them, for, as we shall see, valid Dominion legislation has always the predominant authority.[5b]

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[2] *Beard* v. *Steele* (1873), 34 U. C. R. 43. And see per Wilson, J., *ad loc. cit.*

[3] Per Rose, J., in *Regina* v. *Stone* (1892), 23 O. R. 46. *Cf. Regina* v. *Wason* (1890), 17 O. A. R. 221. And see *infra*, pp. 590-2.

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[4] *Atty.-General for Ontario* v. *Hamilton Street R. W. Co.*, [1903] A. C. 524.

[5] *Tremblay* v. *Cité de Quebec* (1910), R. J. Q. 38 S. C. 82, 37 S. C. 375. And see *infra*, pp. 594-612.

And, lastly, inasmuch as, as we shall see later on, with regard to certain classes of subjects generally described in section 91, legislative powers may reside as to some matters falling within the general description of those subjects, in the provincial legislatures, there may be said to be concurrent jurisdiction as to such subjects in Parliament and the provincial legislatures in this sense, that legislative power as to a certain department or certain departments of broad general subjects of legislation is vested in the one, and as to the remaining departments in the other.[5c]

We arrive, therefore, at this result, that the most that can be said with accuracy is, that the powers of the Dominion parliament and of the local legislatures to deal directly and in their entirety, and as matter of separate and detached legislation (as distinguished from legislative provisions merely ancillary to the main subject of legislation), with the various classes of subjects enumerated in sections 91 and 92, are in each case special and exclusive.

[5a] See *infra*, pp. 164-189.

[5b] See *infra*, pp. 123-7.

[5c] See *infra*, pp. 112-118.

CHAPTER IX.

GENERAL PRINCIPLES OF CONSTRUCTION OF THE BRITISH NORTH AMERICA ACT IN RESPECT TO THE DISTRIBUTION OF LEGISLATIVE POWER.

1. Act to be construed as a whole.—In order to construe the general terms in which the classes of possible subjects of legislation in sections 91 and 92 of the British North America Act are described, both sections and the other parts of the Act must be looked at, to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited. For the British North America Act has to be construed as a whole, and where some specific matter is mentioned as within the exclusive power of one body, Dominion parliament or provincial legislature, as the case may be, which, but for that reference, would fall within the more general description of a subject-matter confided to the other, the statute must be read as excepting it from that general description. And so with regard to certain classes of subjects generally described in section 91 of the British North America Act, legislative power may reside as to some matters falling within the general description of those subjects in the legislatures of the provinces; and, in a sense, the converse also is true in certain cases, and legislative power may reside in the Dominion parliament as to some matters falling within the general description of the provincial classes of subjects enumerated in section 92.

Thus, in the cases of *Citizens Insurance Company* v. *Parsons,*[1] and *Russell* v. *The Queen,*[2] the Privy Council say that sections 91 and 92 must be read together, and the language of the one interpreted, and where necessary, modified by that of the other; and illustrate their meaning by the observation that it could not have been intended, while assuring to the provinces exclusive legislative authority on the subject of property and civil rights, to exclude Parliament from the exercise of its general power to make laws for the peace, order, and good government of Canada in relation to matters not coming within the classes of subjects exclusively assigned to the provincial legislatures, whenever any incidental interference with property and civil rights would result from it. And, in *Attorney-General of Ontario* v. *Mercer,*[3] their lordships say: "The extent of the provincial power of legislation 'over property and civil rights in the province' cannot be ascertained without, at the same time, ascertaining the power and rights of the Dominion under sections 91 and 102.'"[4]

As Mr. Edward Blake very well put it on the argument in the *Bonsecours* case[5]: "These sections of enumeration (*sc.* sections 91 and 92), must be construed so as to avoid a conflict; and this is to be done by cutting out of whatever may be the larger, the more general, the wider, the vaguer enumeration of one section, so much as is comprised in some narrower, more definite, more precise enumeration in the other section. As, for example, in one section you find 'Property and Civil Rights,' in the other 'Bills and Notes;' you excise from 'Property and Civil Rights,' so much as is comprised in 'Bills and Notes.'"

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[1] (1881), 7 App. Cas. at p. 110.

[2] (1882), 7 App. Cas. at p. 839.

[3] (1883), 8 App. Cas. at p. 776.

[4] Section 102 creates a Consolidated Revenue Fund, to be appropriated for the public service of Canada, out of Duties and Revenues over which the respective provincial legislatures had power of appropriation before and at the Union.

[5] [1899] A. C. 367. *Verbatim* report of argument, p. 6.

So, again, in *Bank of Toronto* v. *Lambe,*[6] in deciding upon the validity of a certain Act of the Quebec Legislature, passed in 1882, entitled 'An Act to impose certain direct taxes on certain commercial corporations,' the Privy Council say, that the first thing to enquire into is whether the tax falls within the description of taxation allowed by No. 2 of section 92 of the Federation Act, namely, 'direct taxation within the province in order to the raising of a revenue for provincial purposes'; and, secondly, they say: "If it does, are we compelled, by anything in section 91 or in the other parts of the Act, so to cut down the full meaning of the words of section 92 that they shall not cover this tax." And they point out[7] that in *Citizens Insurance Co.* v. *Parsons,*[8] when dealing with the meaning of the words 'regulation of trade and commerce,' in No. 2 of section 91: "It was found absolutely necessary that the literal meaning of the words should be restricted in order to afford scope for powers which are given exclusively to the provincial legislatures."

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[6] (1887), 12 App. Cas. at p. 581.

[7] 12 App. Cas. at p. 586.

[8] (1881), 7 App. Cas. 96.

It is somewhat surprising, however, to find provincial Courts, as they have done in two cases at any rate, interpreting one of the classes of subjects of legislation mentioned in section 92 by another of the classes in the same section. In one of these cases,[9] a Manitoba Court held, that, although No. 14 of section 92 assigns to provincial legislatures the maintenance of provincial Courts, both of civil and of criminal jurisdiction, this does not authorise them to provide for the maintenance of Courts of Justice and Court houses by the imposition of law stamps on legal proceedings therein, because it must clearly mean maintenance in such manner and by the exercise of such powers as are within the scope of the legislature, and the power of the provincial legislatures as to taxation is defined by No. 2 of section 92 as 'direct taxation within the province in order to the raising of a revenue for provincial purposes.' In the other,[10] an Ontario judge held, that the power given by No. 13 of section 92, as to property and civil rights, "must be qualified in its turn by power No. 2, for the right to deal with property and civil rights, could not authorise the levying of any indirect tax." But, although the provisions of sections 91 and 92 must be interpreted with reference the one to the other, and to other parts of the Act, it seems a strange construction to say that a certain legislative power might have been held to have been given by one of the classes specified in one of these sections, if another legislative power had not been given by another class specified in the same section.

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[9] *Dulmage* v. *Douglas* (1887), 4 M. R. 495.

[10] *Regina* v. *Taylor* (1875), 36 U. C. R. at p. 201.

To return to the general subject of interpreting section 91 by section 92, and *vice versa,* in *Citizens Insurance Co.* v. *Parsons,*[11] the Privy Council observe that, notwithstanding the endeavour of section 91 of the British North America Act, to give pre-eminence to the Dominion parliament in case of a conflict of powers, it is obvious that, in some cases in which this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the Dominion parliament. For example, they say that solemnization of marriage would come within the general description 'marriage and divorce,' which is contained in the enumeration of subjects in section 91, yet 'solemnization of marriage in the province' is enumerated among the classes of subjects in section 92, and no one can doubt, notwithstanding the general words of section 91, that this subject is still within the exclusive authority of the legislatures of the provinces.[12] So the raising of money by any mode or system of taxation, is enumerated among the classes of subjects in section 91, but the description is sufficiently large and general to include 'direct taxation within the province in order to the raising of a revenue for provincial purposes,' assigned to the provincial legislature by section 92, and it obviously could not have been intended that in this instance, also, the general power should override the particular one. In these cases their lordships add: "It is the duty of the Courts, however difficult it may be, to ascertain in what degree and to what extent authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified by that of the other." In such cases, to quote words of the Privy Council in another case,[13]: "The literal meaning of the words in section 91 should be restricted in order to afford scope for powers which are given exclusively to the provincial legislatures."

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[11] (1881), 7 App. Cas. at p. 108.

[12] See *infra*, pp. 314 *et seq.*

In some instances, however, as has been pointed out by a learned judge of the Ontario Court of Appeal,[14] it would be more correct to say that the Dominion parliament has been invested with a power excepted out of some general power conferred upon provincial legislatures. He says: "There are some cases in which the power is given generally to the provinces to

Hodge v Queen.

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[13] (1887), 12 App. Cas. at p. 586.

[14] *Hodge* v. *The Queen* (1882), 7 O. A. R. at p. 274, per Burton, J.A.

deal with a particular subject. Take, for instance, 'property and civil rights,' which in these general terms would comprise the power to regulate contracts of every kind, including bills of exchange and promissory notes. When, therefore, we find the Dominion entrusted with an exclusive power to legislate upon bills and notes, the only way to make the Act consistent is to read this as an exception to the general power granted to the province. So, again, although the provinces have exclusive power, under sub-section 14, to make laws 'in relation to the administration of justice in the province, including the constitution, maintenance, and organization of provincial Courts, both of civil and criminal jurisdiction,' when we find bankruptcy and insolvency mentioned as a subject for the exclusive jurisdiction of the Dominion, we must, necessarily, understand that the organization of an insolvent Court, and administration of justice and proceedings connected with insolvency, are excepted from the general words of that sub-section. But to that extent only can the Dominion parliament assume to interfere."

Thus, as it has been often expressed, the subjects enumerated in sections 91 and 92 of the British North America Act, in many cases "overlap," or, to use an expression of Lord Watson's, on the argument before the Privy Council on the Manitoba School Case, 1894,[18] "interlace," and so, therefore, may Dominion and provincial legislation upon them. In such case neither legislation will be *ultra vires* if the field is clear; but, if the field is not clear, and in such domain the two legislations meet, then, the Dominion legislation must prevail. The Privy Council have so expressed themselves in two recent cases,[16] and it is especially this "double enumeration" which causes difficulty in the construction of the Act; and has been sometimes made the subject of hostile comment. Probably, however, Dorion, C. J., is quite justified in saying [17]: "I consider that the Act is as clear as it could be made, to embrace so many questions in a small compass." Not only, indeed, do some of the enumerated classes of subjects in the one section overlap some of those in the other section, but, if either of the two sections are taken separately, in some instances, the subjects enumerated in the same section overlap each other. As to section 91, however, as Sir Farrer Herschell, as he then was, observed on the argument in the matter of the Dominion License Acts [18]: "It must be remembered that the enumerated subjects in that section are only subordinate enumerations for greater certainty, but not to exclude the generality of the words that go before; and, when they are simply specifying things for greater certainty, some of those specifications may very well overlap. They may very well include certain things that would be included within the more general terms, but they specified them for greater certainty."

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[18] *Brophy* v. *Attorney-General of Manitoba*, [1895] A. C. 202.

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[16] *Grand Trunk R. W. Co.* v. *Attorney-General of Canada*, [1907] A. C. at pp. 67-9; and *City of Montreal* v. *Montreal Street R. W. Co.*, [1912] A. C. at p. 343, as to which latter case see *infra* pp. 344-6. See, also, *Rex* v. *Hill* (1907), 15 O. L. R. 406.

[17] In *Dobie* v. *The Temporalities Board*, 3 L. N. at p. 254.

[18] Transcript from Marten and Meredith's shorthand notes, at p. 167.

2. Rules for testing validity of Acts. — In determining the validity of a Dominion Act, the first question to be determined is, whether the Act falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the legislatures of the provinces. If it does, then the further question will arise, whether the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and so does not still belong to the Dominion parliament. But if the Act does not fall within any of the classes of subjects in section 92, no further question will remain. In like manner, in determining the validity of a provincial Act, the first question to be decided is whether the Act impeached falls within any of the classes of subjects enumerated in section 92 of the British North America Act, and assigned exclusively to the legislatures of the provinces, for, if it does not, it can be of no validity, and no further question would then arise. It is only when an Act of the provincial legislature *prima facie* falls within one of these classes of subjects that the further question arises, namely, whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and so does not belong to the Dominion parliament. /For, notwithstanding anything in the British North America Act, the exclusive authority of the parliament of Canada extends to all matters coming within the classes of subjects enumerated under the various items in section 91. These are the rules for determining the constitutionality of Dominion or provincial Acts laid down by the Privy Council in *Russell* v. *The Queen,*[19] and *Citizens Insurance Co.* v. *Parsons,*[20] and repeated and applied by them in *Dobie* v. *The Temporalities Board,*[21] and *Bank of Toronto* v. *Lambe.*[22] In the first of these cases their lordships add: "It cannot be contended, and, indeed, was not contended at their lordships' Bar, that, if the Act does not come within one of the classes of subjects assigned to the provincial legislatures, the parliament of Canada had not, by its general power, to make laws for the peace, order, and good government of Canada, full authority to pass it."[22a]

Of course, as has already been pointed out, the subject-matter of a provincial Act may fall within one of the general subjects enumerated in section 91, in a broad interpretation of the latter, and yet the provincial legislature may have exclusive power to deal with it. To put it in another way, there are cases where it is possible and proper to give so large a meaning to the words of section 91, that section 92 can still be left to have effect by way of exception. It must also be borne in mind that, as we shall see, the exercise of provincial legislative powers, and the operation of provincial Acts, may be sometimes more or less restricted by reason of existing Dominion legislation.[22b]

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[19] (1882), 7 App. Cas. at p, 836.

[20] (1881), 7 App. Cas. at p. 109.

[21] (1882), 7 App. Cas. at p. 149.

[22] (1887), 12 App. Cas. at p. 581.

[22a] See *supra*, pp. 94-9.

[22b] This seems as good a place as any to note the words of the Privy Council in *Washington* v. *Grand Trunk R. W. Co.*, [1899] A. C. at p. 280: "The decision of the Court of Appeal seems to have been influenced by contrasting the Act of Parliament with certain statutes enacted by the legislature of Ontario for the regulation of provincial railways. As these are enactments emanating from a different legislative body from that which passed the statute to be interpreted, and cannot be said to be *in pari materiâ* with it, their lordships are unable to see that they ought to have any influence upon the question to be decided arising exclusively under the Dominion Act relating only to Dominion railways." As to text, see *infra*, pp. 123-7.

CHAPTER X.

PREDOMINANCE OF DOMINION LEGISLATION.

Where, in respect to matters with which provincial legislatures have power to deal, provincial legislation directly conflicts with enactments of the Dominion parliament, whether the latter immediately relate to the enumerated classes of subjects in section 91 of the British North America Act, or are only ancillary to legislation on such subjects, or are enactments for the peace, order, and good government of Canada in relation to matters not coming within the classes of subjects assigned exclusively to the provincial legislatures, nor within the enumerated classes of section 91, the provincial legislation must yield to that of the Dominion parliament. For before the laws enacted by the federal authority, within the scope of its powers, the provincial lines disappear. As to these laws we have a quasi-legislative union. They are the local laws of the whole Dominion, and of each and every province thereof. The Privy Council has affirmed this predominance of Dominion legislation in no less than six judgments.[1] Thus, in one case,[2] they say that provisions in regard to voluntary assignments for the benefit of creditors, and giving them precedence of executions, might be included in bankruptcy legislation, as ancillary thereto, and as alternative to compulsory bankruptcy proceedings, and that provincial legislatures would be then precluded from interfering with the legislation, though in the absence of any such Dominion bankruptcy law, they held the like provisions in the Ontario Assignments and Preferences Act *intra vires*. And in another,[3] they held that the enactments of the Ontario Liquor License law, 1890, must yield to those of the Canada Temperance Act, 1886, so far as they came into collision with the latter, "and must remain in abeyance unless and until the Act of 1886 is repealed by the parliament which passed it." Nor does it make any difference whether the provincial enactments be prior in date to the conflicting Dominion enactments, or subsequent.[4] But, as their lordships also point out in the last mentioned case, the Dominion parliament has no authority to repeal directly any provincial statute, whether it does or does not come within the limits of jurisdiction prescribed by section 92, any more than a provincial legislature can repeal a Dominion Act. This case further shows that it makes no difference whether the Dominion legislation in question be under the general residuary power of the Dominion parliament, or under any of its enumerated powers, for it was under the former, and not under the latter, that the Board placed the power to pass the Canada Temperance Act.

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[1] See, besides the three cases here particularly referred to, *Tennant* v *The Union Bank of Canada*, [1894] A. C. 31; *Grand Trunk R. W. Co.* v. *Attorny-General of Canada*, [1907] A. C. at p. 68; *Crown Grain Co.* v. *Day*, [1908] A. C. at p. 507.

[2] *Attorney-General of Ontario* v. *Attorney-General of Canada*, [1894] A. C. 189.

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[3] Liquor Prohibition Appeal, 1895, [1896] A. C. 348.

[4] See *L'Union St. Jacques de Montreal* v. *Belisle*, L. R. 6 P. C. 31, at pp. 36-7; Liquor Prohibition Appeal, 1895, [1896] A. C. at pp. 366-7, 369; and Legislative Power in Canada, at pp. 529-30.

Their lordships reiterate the same doctrine in the recent case of *La Compagnie Hydraulic de St. Francois* v. *Continental Heat and Light Co.,*[4a] where they affirmed the Court below in holding that the power conferred by a provincial legislature on an industrial company in the incorporating Act, to carry on their corporate enterprise to the exclusion of every other company, in a designated territory, is without effect against a company constituted for similar ends by a previous statute of the parliament of Canada. They say: "The contention on behalf of the appellant company was that the only effect of the Canadian Act was to authorise the respondent company to carry out the contemplated operations in the sense that its doing so would not be *ultra vires* of the company, but that the legality of the company's action in any province must be dependent on the law of that province. This contention seems to their lordships to be in conflict with several decisions of this Board. Those decisions have established that where as here, a given field of legislation is within the competence both of the parliament of Canada, and of the provincial legislature, and both have legislated, the enactment of the Dominion parliament must prevail over that of the province if the two are in conflict as they clearly are in the present case. It must, however, be remembered that in this case, as in *City*

[4a] [1909] A. C. 194, reported below (1907), R. J. O. 16 K. B. 406.

of Toronto v. *Bell Telephone Co.*,[4b] the Dominion company in question fell within the enumerated classes of subjects in section 91, viz., No. 29.

But the rule as to predominance of Dominion legislation, it may be confidently said, can only be invoked in cases of absolutely conflicting legislation *in pari materia*, when it would be an impossibility to give effect to both the Dominion and the provincial enactments. And, of course, provincial legislation which is merely supplemental to Dominion legislation, may be perfectly good, at any rate when the latter is not within one of the enumerated classes of subjects. Thus, where the Dominion Companies Act provided a method for serving summonses, notices, and other documents on a company incorporated under that Act, this was held not to prevent provincial, or rather North-West Territorial, legislation, providing that such companies must file a power of attorney to some person in the Territories upon whom process might be served, before they could be registered and enabled to carry on their business in the Territories, thus providing another and more convenient method for the service of process upon such company.[5]

And the Privy Council have certainly not received with favour the contention which has been raised, in certain cases, that provincial powers of legislation are restricted or placed in abeyance by the very inaction of the

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[4b] [1905] A. C. 52, 6 O. L. R. 335, 3 O. L. R. 465.

[5] *Rex* v. *Massey-Harris Co.* (1905), 6 Terr. L. R. at p. 131.

Dominion parliament, or by reason of the fact that the latter has legislated *in pari materia,* though conditionally only upon the exercise of local option, which latter has not been exercised in favour of the operation of the Act.[6]

And, lastly, in cases where Parliament has legislated under its general power of legislation, as distinguished from its enumerated powers, there may be nothing to prevent a province legislating *in pari materia* to meet the special wants of that particular locality.[7]

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[6] Legislative Power in Canada, pp. 534-537.

[7] A curious question may be raised as to what law governs Dominion subjects in Canada, when and so far as the Dominion parliament has not legislated on them. If we are to say that there is any one body of law upon Dominion subjects behind Dominion legislation, it seems clear that we must look to the English common law; and the gradual results of that theory would tend towards a uniformity of law throughout Canada, with the sole exception of those subjects assigned by the British North America Act to the provinces, and dealt with in Quebec under the French law. The competitive theory would be that the Dominion legislative powers, when exercised, apply in each province, and the effect of them in any particular province has to be judged according to the law of that province, so that behind the Dominion legislative powers in Quebec there would be the French law, and in the other provinces the English law. This, no doubt, is the theory which is most likely to be accepted. In what, perhaps, may be called the Indian Treaty Indemnity case (*Province of Ontario* v. *Dominion of Canada*, [1910] A. C. 637, 42 S. C. R. 1), where a question arose as to the right of the Dominion to require the province of Ontario to indemnify it in respect to a treaty of surrender entered into by the Dominion with certain tribes of Indians of certain lands within the boundaries of Ontario, counsel for the Dominion had relied upon certain principles of the civil law. In the Supreme Court, Idington, J., observes (p. 102):—"As to the civil law, invaluable as it often is to afford light upon the origin of what is found in much of the Civil Code of Quebec and the exceptional cases arising in that province left unprovided for by that Code, it is no disparagement of the civil law to say that it is not of much direct service when we come to consider questions arising upon the

CHAPTER XI.

EXCLUSIVENESS OF DOMINION ENUMERATED POWERS.

Notwithstanding anything in the British North America Act, the exclusive legislative authority of the parliament of Canada extends to all matters coming within the classes of subjects enumerated under the various items of section 91. Here, again, we are merely quoting words embraced in the 91st section of the Federation Act, but they gave rise to comment in the judgment of the Privy Council in the *Fish-*

British North America Act, or upon legislation of the Dominion which usually applies uniformly to all the provinces, and of still less value is it when we have, as here, to consider the legislation of another province than Quebec. The civil law is the ultimate origin of much that concerns property and civil rights in Quebec, but when these subject-matters were relegated by the British North America Act to the respective jurisdictions of the provinces there was no longer need for its consideration as having any binding or operative effect in relation to the formation of the government of the Dominion as a whole, or its relation to its several parts, or anything springing therefrom." In the judgment on appeal in this case the Privy Council say. [1910] A. C. at p. 645:—"It may be that, in questions between a Dominion comprising various provinces of which the laws are not in all respects identical on the one hand, and a particular province with laws of its own on the other hand, difficulty will arise as to the legal principle which is to be applied. Such conflicts may always arise in the case of States or provinces within a union. But the conflict is between one set of legal principles and another. In the present case it does not appear to their lordships that the claim of the Dominion can be sustained on any principle of law that can be invoked as applicable." In *Cook* v. *Dodds* (1903), 6 O. L. R. 608, it was held that as the Bills of Exchange Act does not deal with the consequences which are to flow from the character which it attaches to the promise *eries* case,[1] in connection with the question then before them, viz., whether regulations controlling the manner of fishing being, undoubtedly, within the competence of the Dominion parliament, under No. 12 of that section (' Sea Coast and Inland Fisheries '), they can, nevertheless, be the subject of provincial legislation also, in so far as it is not inconsistent with the Dominion legislation. They say: " The earlier part of this section, read in connection with the words beginning ' and for greater certainty,' appear to amount to a legislative declaration that any legislation falling strictly within any of the classes specially enumerated in section 91, is not within the legislative competence of the provincial legislatures under section 92. In any view, the enactment is express that laws in relation to matters falling within any of the classes enumerated in section 91, are within the ' exclusive ' legislative authority of the Dominion parliament. Whenever, therefore, a matter is

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which a bill or note contains, whether that of a joint, or a joint and several, liability, these consequences fall to be determined according to the law of the province in which the liability is sought to be enforced. In Responsible Government in the Dominions (Vol. 2, p. 793), Mr. Keith discusses the question whether there is a common law of the Commonwealth of Australia and expresses the view that there is no such common law save in so far as the prerogatives of the Crown are concerned. He adds: 'It is true, of course, that in each of the States the common law prevails, and in interpreting as a Court of Appeal the statutes of the States the High Court will interpret the common law, but that does not make the common law in force as a part of the common law of the Commonwealth, though within the range of the subjects committed to it it will be possible for the Commonwealth to declare that the doctrines of the common law shall apply.'

[1] [1898] A. C. 700, at pp. 715-716.

within one of these specified classes, legislation in relation to it by a provincial legislature is, in their lordships' opinion, incompetent. It has been suggested, and this view has been adopted by some of the judges of the Supreme Court, that, although any Dominion legislation dealing with the subject would override provincial legislation, the latter is, nevertheless, valid, unless and until the Dominion parliament so legislates. Their lordships think that such a view does not give their due effect to the terms of section 91, and in particular to the word 'exclusively.' It would authorise, for example, the enactment of a bankruptcy law or a copyright law in any of the provinces unless and until the Dominion parliament passed enactments dealing with those subjects. Their lordships do not think this is consistent with the language and manifest intention of the British North America Act. It is true the Board held, in the case of *Attorney-General of Canada* v. *Attorney-General of Ontario*,[2] that a law passed by a provincial legislature, which affected the assignments and property of insolvent persons, was valid as falling within the heading 'property and civil rights,' although it was of such a nature that it would be a suitable ancillary provision to a bankruptcy law. But the ground of this decision was, that the law in question did not fall within the class 'bankruptcy and insolvency' in the sense in which those words were used in section 91. For these reasons, their lordships feel constrained to hold, that the enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion legislature, and is not within the legislative powers of provincial legislatures. But, whilst in their lordships' opinion all restrictions or limitations by which public rights of fishing are sought to be limited or controlled, can be the subject of Dominion legislation only, it does not follow that the legislation of provincial legislatures is not competent merely because it may have relation to fisheries. For example, provisions prescribing the mode in which a private fishery is to be conveyed or otherwise disposed of, and the rights of succession in respect of it, would be properly treated as falling under the heading 'property and civil rights' within section 92, and not as in the class 'fisheries' within the meaning of section 91. So, too, the terms and conditions upon which the fisheries which are the property of the province may be granted, leased, or otherwise disposed of, and the rights which consistently with any general regulations respecting fisheries enacted by the Dominion parliament may be conferred therein, appear proper subjects for provincial legislation, either under class 5 of section 92, 'the management and sale of public lands,' or under the class 'property and civil rights.' Such legislation deals directly with property, its disposal, and the rights to be enjoyed in respect of it, and was not, in their lordships' opinion, intended to be within the scope of the class 'fisheries' as that word is used in section 91." It is, then, only that subject-matter which is within the proper meaning and interpretation of one of the enumerated classes of section 91, that is for the exclusive legislative jurisdiction of the Dominion parliament; and we must not take too narrow and literal a view of the words by which those classes are described. But the important thing to notice is, that under the British North America Act, legislative power is distributed by subjects and not by area; and this will be further illustrated by what we shall have to say as to locally restricted Dominion laws.

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[2] [1894] A. C. 189.

CHAPTER XII.

GENERAL CHARACTER OF DOMINION POWERS.

1. General subjects of Dominion interest.—The principle of the 91st section of the British North America Act is to place within the legislative jurisdiction of the Dominion parliament general subjects which may be dealt with by legislation, as distinguished from subjects of a local or private nature in the province. As the late Mr. Justice Sedgewick of the Supreme Court of Canada has said, the English-speaking provinces were, in the main, in favour of a legislative union, but Lower Canada, "properly tenacious in its language, its institutions, and its laws," desired a provincial legislature, in order to the perpetuity of these rights, and necessitated a federal union or none at all: "but they were none the less desirous of giving the central authority all jurisdiction compatible with that determination, including generally those subjects that would be common to the whole Canadian people, irrespective of origin or religion. Now the English criminal law was the law of Lower Canada. . Then, too, the Lower Canadian legislature and people had long previously adopted, of their own free will, the general principles of English commercial law. . . Commercial law was not in that class of institutions and laws, which they regarded as peculiarly their own, and they were willing that the federal parliament should alone legislate in respect thereto.'"[1] And for the rest, it will be readily seen that the other Dominion powers relate to matters necessarily and naturally proper for federal administration.

To quote words of Sir John Macdonald, in the Debates before Confederation: "All the great questions which affect the general interests of the Confederacy as a whole, are confided to the Federal parliament, while the local interests and local laws of each section are preserved intact, and entrusted to the care of the local bodies."[2] And so, to quote a Maritime province judge,[3]: "The power to make laws in relation to the regulation of trade and commerce, like that relating to bills of exchange, or interest, weights and measures, or legal tender, and certain other powers, was a necessary incident to the Union to secure a homogeneous whole, the object of the Union being to draw together the scattered settlements of the different provinces, of diverse races and religions, into one common people, to give them, as far as practicable, a community of interest and feeling; that, so far as could be done consistently with their relative positions, their commercial intercourse with each other should be analogous; that the merchant or manufacturer in Ontario should find in Nova Scotia or New Brunswick, the same principles of commercial law as were in operation in his own province; and transact his business, buy, sell, and trade, upon the same principles with an inhabitant of Pictou or St. Stephen as with a citizen of Toronto or London." And in like manner, to quote, this time, a Quebec judge,[4]: "It is in the interest of the trade and commerce of the whole Dominion that there should be one uniform law for all the provinces, regulating proceedings in the case of insolvent debtors, unrestricted in its operation by provincial boundaries; that it should be possible to obtain a national execution, and not merely a limited provincial one against the estate of an insolvent debtor who might hold property in several provinces, or transfer it from his own province into another."[5]

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[1] *In re Prohibitory Liquor Laws* (1895), 24 S. C. R. at pp. 232-4.

[2] An interesting paper by Professor Leacock of the University of McGill, published among the Proceedings of the American Political Science Association, 1909, brings home to one to how great an extent the framers of the British North America Act, as compared with those of the Constitution of the United States, in fixing the exclusive legislative powers of the Dominion parliament, minimised the disadvantages in the economic and industrial sphere which are inseparable from federal government and divided jurisdictions.

[3] Fisher, J., in *Queen* v. *Mayor, etc., of Fredericton* (1879), 3 Pugs. & B. at pp. 168-9.

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[4] Wurtele, J., in *Dupont* v. *La Cie de Moulin* (1888), 11 L. N. 225. *In Bank of Toronto* v. *Lambe* (1885), M. L. R. 1 Q. B. at p. 146, Dorion, C.J., says: "Every provision of the British North America Act shews that the object of the promoters of the measure was to place each province in a state of perfect independence, as regards each other, to establish the utmost freedom of intercourse and commercial relations between them, to exclude from the legislative authority of the provinces all regulations as to trade and commerce, customs and excise, navigation and shipping, banks, bankruptcy and insolvency—in fact every subject which might give occasion to an interference by one province directly or indirectly which would affect the interests of the other provinces." However, the decision of the Privy Council in that case, (1887), 12 App. Cas. 575, shews him to be in error in the conclusion he proceeds to draw, that the Quebec Act in question, taxing monetary institutions incorporated and domiciled in other provinces, and whose stock was held by people residing out of Quebec, was *ultra vires;* and it also shews that he went too far in saying, in *Attorney-General of Quebec* v. *Attorney-General of the Dominion* (1876), 2 Q. L. R. at p. 237, that: "the provincial legislatures exercise their authority over matters affecting the inhabitants of their respective provinces only."

In the course of the argument before the Privy Council in *Canadian Pacific R. W. Co.* v. *Bonsecours,*[5a] Lord Watson advanced the proposition that "the powers of the Dominion parliament as defined in section 91 only extend to such laws as are for the peace, order, and good government of Canada. There does not fall under the concluding words of that section any legislation which cannot be predicated as for the peace, order, and good government of Canada." This was immediately before a temporary adjournment of the Board. On resuming, the following is reported as taking place:—

Mr. Blake: "I was about to refer your lordships to the *License* case, *Attorney-General for Ontario* v. *Attorney-General for the Dominion,*[5b] which determined that the concluding portion of section 91, also, had a general application, having the same virtue in fact as the initial portion of the clause.[5c]

Lord Watson: "That is to say, the effect of the general words of section 91 was to give to the Dominion parliament the whole power of making laws for the peace, order, and good government of Canada."

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[5] As a matter of fact, however, there has been no Dominion Insolvency or Bankruptcy law since 1880, save in the case of corporations: see 43 Vict. c. 1, D.

[5a] [1899] A. C. 367. See *verbatim* report of argument at pp. 9-10.

[5b] [1896] A. C. 348.

[5c] As to the concluding portion of section 91, see *infra*, pp. 138-9; 168.

Mr. Blake: "That is so; but this has to do with the question of the exclusive powers with reference to the enumerated articles."

It will be remembered that in this *Bonsecours* case the contention of the appellants, for whom Mr. Blake was of counsel, was that because the Dominion parliament had exclusive powers under section 91 to make laws in relation to such a railway as the Canadian Pacific Railway, therefore a provincial Act authorising a municipality to require that railway company to keep one of its ditches, situate on its property alongside its track, in good order and free from obstruction, was *ultra vires.* Lord Watson appears to mean that the Dominion parliament has under section 91 no power given it to legislate in relation even to the enumerated classes of subjects in that section, unless it can be predicated of such legislation that it is legislation for the peace, order, and good government of Canada. Yet suggestive and interesting though it be, after the manner of Lord Watson's *dicta,* the practical value of the proposition may be small. No Court has up to the present, it is believed, ventured to hold that Dominion legislation in relation to the enumerated classes of subjects is *ultra vires* because not legislation for the peace, order, and good government of Canada. It may, moreover, be pointed out that section 91 says that the gift of exclusive legislative authority over the enumerated classes of subjects, is to be read 'not so as to *restrict* the generality of the foregoing terms of this section.' It is not said that they are not to be read so as to 'enlarge' the apparent restriction in the foregoing terms of the section of Dominion legislative power to legislation 'for the peace, order, and good government of Canada.' Later on, however, in the same argument (p. 19) Lord Watson, referring to the fact that the power of the Dominion parliament over such railways as the Canadian Pacific Railway is, under section 92, sub-section 10, excepted out of the provincial power over local works and undertakings, is reported as saying:—"Because it is an exception, they cannot under that exception assume jurisdiction to legislate on matters which are of a private nature. They can only assume to legislate where the result is a law for the peace, order, and good government of Canada."[5d]

2. Dominion enumerated powers and concluding clause of section 91.—'Any matter coming within any of the classes of subjects enumerated in section 91 of the British North America Act shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of classes of subjects by the Act assigned exclusively to the legislatures of the provinces.' These it will be remembered are the very words of the concluding clause of section 91 of the British North America Act, and, after much discussion in various cases, their force and meaning have been finally determined very clearly by the Privy Council in the following passage of their judgment in the Liquor Prohibition Appeal 1895[6]: "It was apparently contemplated by the framers of the Imperial Act of 1867, that the due exercise of the enumerated powers conferred upon the parliament of Canada by section 91 might, occasionally and incidentally, involve legislation upon matters which are *prima facie* committed exclusively to the provincial legislatures by section 92. In order to provide against that contingency, the concluding part of section 91 enacts that 'Any matter, etc. .' It was observed by this Board in *Citizens Insurance Co.* v. *Parsons*,[7] that the paragraph just quoted 'applies, in its grammatical construction, only to No. 16 of section 92.' The observation was not material to the question arising in that case, and does not appear to their lordships to be strictly accurate. It appears to them that the language of the exception in section 91 was meant to include, and correctly describes, all the matters enumerated in the sixteen heads of section 92, as being, from a provincial point of view, of a local or private nature. It also appears to their lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen sub-sections, save to the extent of enabling the parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerated heads of clause 91. . . To those matters

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[5d] See also *supra*, p. 93.

[6] [1896] A. C. at pp. 359-360. Their lordships themselves formulate the principles to be derived from their judgment in

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this case, in their later judgment in *City of Montreal* v. *Montreal Street Railway*, [1912] A. C. at pp. 343-4, as to which case see also *supra*, p. 99, and *infra*, pp. 344-6.

[7] (1881) 7 App. Cas. at pp. 108-9.

which are not specified among the enumerated subjects of legislation, the exception from section 92, which is enacted by section 91, has no application; and, in legislating with regard to such matters, the Dominion parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by section 92." And, although in the above passage the Privy Council say that the concluding clause of section 91 was not meant to derogate from the legislative authority of the provincial legislatures save to the extent of enabling the Dominion parliament to fully exercise its enumerated powers, it would not seem that they intend this as a pronouncement in any way against that interpretation of it, which would also find in it the further significance that the provincial legislatures cannot legislate on any of the enumerated matters in section 91 for their own provinces, under the pretence or contention that the legislation is of a provincial or local character.[8] Without the concluding clause of section 91 it might have been supposed that although section 91 says that Parliament may exclusively legislate upon the matters therein enumerated, this only means that it alone may legislate upon these subjects for the whole Dominion, but does not prevent the provinces legislating upon them within the limits of each province.

3. Matters of a 'merely local or private nature in the province.'—And, although it has thus been finally decided that the concluding clause of section 91, which we have been considering, has reference not only to No. 16 of section 92, but to all the matters enumerated in the latter section, this seems, nevertheless, a convenient place for discussing the purport of No. 16, which assigns to provincial legislatures the exclusive power of making laws in relation to 'generally all matters of a merely local or private nature in the province.'[8a]

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[8] See Legislative Power in Canada, at pp. 650-651.

In their judgment in the Liquor Prohibition Appeal, 1895,[9] the Privy Council say: "In section 92, No. 16 appears to have the same office which the general enactment with respect to matters concerning the peace, order, and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in section 91. It assigns to the provincial legislature all matters in a provincial sense local or private, which have been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include provincial legislation in relation to subjects already enumerated."

Now 'local,' in No. 16, does not mean local in a spot in a province, but local in the sense of confined within the boundaries of the province. If an Act is confined in the sphere of its operations to the limits of the province, it is a 'local' Act within the meaning of the words of No. 16 of section 92, although, of course, whether it is *intra vires* or not must depend upon whether, notwithstanding this, the subject of the Act does or does not fall within one of the enumerated classes of subjects in section 91. Thus, in a very recent appeal,[10] the Privy Council have held the Liquor Act of Manitoba, 63-64 Vict. ch. 22, *intra vires* as relating to a matter of a merely local nature in the province within No. 16, although it purported to prohibit all use in Manitoba of spirituous fermented malt and all intoxicating liquors as beverages or otherwise, subject to certain exceptions. And they further state that, in their opinion, matters which are substantially of local or of private interest in a province, matters which are of a local or private nature from a provincial point of view, are not excluded from the category of 'matters of a merely local or private nature,' because legislation, dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the province, and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades. As to the significance of the word 'merely,' in item 16—matters of 'merely' local or private interest—the subject has been considerably discussed in various arguments before the Privy Council, and the outcome would seem to be that it means "not touching by its immediate and direct operations those outside the province.'"[11] And, as Lord Herschell incidentally observed in the course of one of these arguments, there is scarcely anything which may be desirable and beneficial for a province to deal with locally, which may not become, some time or other, a matter of Dominion concern, and, therefore, one on which it might be necessary for the Dominion Parliament to legislate for the whole Dominion, which would oust the power of the provincial legislature. For, inasmuch as the exclusive power of legislation given to the provinces is over such matters *qua* their merely local or private nature, if they partake also of a general nature—or, in other words, if, in another aspect, they assume the form of matters affecting the peace, order, and good government of the whole Dominion—or it may be of more than one province—there is nothing to prevent Parliament legislating upon such matters in this latter aspect under its general powers conferred by section 91. There is, obviously, nothing in this inconsistent with the provisions of section 91, that the general Dominion power of legislation does not extend to matters coming within the classes of subjects assigned exclusively to the legislatures of the provinces.

[8a] See, also, *infra*, pp. 627-9.

[9] [1896] A. C. at p. 365.

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[10] *Attorney-General of Manitoba* v. *Manitoba License Holders' Association*, [1902] A. C. 73. Reported below, 13 Man. 239.

[11] See Legislative Power in Canada, pp. 655-661.

CHAPTER XIII.

LOCALLY RESTRICTED DOMINION LAWS.

It would seem that if the subject-matter dealt with comes within the classes of subjects assigned to the parliament of Canada (or, if, though this be not the case, the law be one for the peace, order, and good government of Canada in relation to any matter not coming within the classes of subjects assigned to the legislatures of the provinces) there is no restriction upon that Parliament to prevent it passing a law affecting one part of the Dominion and not another, if in its wisdom it thinks the legislation applicable to and desirable in one and not in the other. This certainly seems to follow—so far as the enumerated classes of subjects are concerned—from the decision of the Supreme Court, in *Quirt* v. *The Queen.*[1] In that case the Court held *intra vires* as an Act in relation to bankruptcy and insolvency, the Dominion Act, 33 Vict. ch. 40, which, reciting the insolvency of the Bank of Upper Canada, provided for its winding up, and for a fair and equitable adjustment and settlement of the claims of all creditors. For, if by virtue of its power to make laws in relation to bankruptcy and insolvency, Parliament can provide for the winding up in insolvency of a single institution, it would seem *a fortiori* that it could confine the scope of its bankruptcy and insolvency legislation within any territorial limits it saw fit. And, in this case, Strong, C.J., considers[2] the Privy Council, as indicating in *L'Union St. Jacques de Montreal* v. *Balisle,*[3] "that a special statute, providing for the winding up of an incorporated company, would be bankruptcy or insolvency legislation." Patterson, J.A., also, expresses himself in like manner as to this Privy Council judgment.[4] In fact, the argument advanced by Street, J., in the Court below,[5] that "the local legislatures, having no power to deal with insolvency legislation at all, are debarred from passing either a general or special Act, and the right must, therefore, exist in the other legislature," seems unanswerable. And this view of the power of the Dominion parliament to pass local laws in relation to the enumerated classes of subjects in section 91, is confirmed by another decision of the Supreme Court in the case of *The Picton,*[6] where it unanimously affirmed the validity of the Dominion Act constituting the Maritime Court of Ontario, under 'navigation and shipping,' and 'the regulation of trade and commerce,' in spite of the argument that as a Dominion Court its jurisdiction could not properly be limited to a single province.

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[1] (1891), 19 S. C. R. 510.

But as to the Dominion parliament having a like power of enacting statutes to operate in certain provinces, or a certain province only, when legislating under its general residuary power to pass laws for the peace, order, and good government of Canada upon non-provincial subjects, it must be admitted that direct authority on the point is not to be found in reported decisions. Nevertheless, the matter has been considerably discussed in various arguments before the Judicial Committee in a manner which tends to confirm what is stated above.[7] As was well said by Counsel in one of them—in the division of subjects by the British North America Act, the way in which legislation is divided between the provinces and the Dominion is not, with reference to the area to which the legislation is to apply, but with reference to the subject-matter of that legislation. And the words of Mr. Edward Blake, in another argument, may well be adopted as a correct summary of the whole matter: "You have the powers limited, when you come to the province, by the area and the objects; provincial areas and provincial objects are the scope. I think each one of the provincial powers is indicated in itself to be for provincial purposes. Instead of setting that out generally at the commencement, in each one of the articles it is specifically stated. But you find, on the contrary, unlimited, save by the express exception, general powers, both as to scope, area, and objects, in the Dominion. There is, therefore, as I submit, nothing whatever to indicate in the least degree that the power of the parliament of Canada was so limited as to those subjects on which it might enact, that it could not, if the welfare of the whole community in its opinion demanded, enact with reference to particular parts of that community the legislation which the condition of that part might, in the interest of all, specially demand."

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[2] 19 S. C. R. at p. 517. And *cf.* per Osler, J.A., S. C., 17 O. A. R. at p. 443.

[3] (1874) L. R. 6 P. C. at p. 36.

[4] 19 S. C. R. at pp. 521-2.

[5] 17 O. R. at p. 618.

[6] (1879) 4 S. C. R. 648.

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[7] Law of Legislative Power in Canada, pp. 574-581.

In connection with this subject, however, another point might possibly arise, on which the late Lord Watson is reported to have expressed himself on the argument in the case of *Union Colliery Company* v. *Bryden,*[8] as follows: "It was discussed at the Bar in some of the cases—I do not think it was made the subject of decision—how far the parliament of Canada would have a right to deal in the case of two or three provinces *with a subject which equally concerned them all*—to have legislated in two or three provinces and not in the others. I think there was a *consensus* of opinion that they had not that power." Lord Watson, however, was referring to legislation under the general residuary power, not to legislation under the enumerated classes of Dominion subjects.

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[8] [1899] A. C. 580. Transcript from Martin, Meredith and Henderson's shorthand notes, pp. 34-35.

CHAPTER XIV.

DOMINION POWER OVER ALL CANADIAN SUBJECTS.

The Dominion parliament can, in matters within its sphere, impose duties upon any subjects of the Dominion, whether they be officials of provincial Courts, other officials, or private citizens.[1] Thus, in their recent judgment, in respect to Supreme Court references,[2] the Privy Council say: "Is it to be said that a power to place upon the Supreme Court the duty of answering questions of law or fact, when put by the Governor-General in Council, does not reside in the parliament of Canada? This particular power is not mentioned in the British North America Act, either explicitly or in ambiguous terms. . . All depends upon whether such a power is repugnant to that Act. . . If notwithstanding the liability to answer questions, the Supreme Court is still a Judiciary within the meaning of the British North America Act, then there is no ground for saying that the impugned Canadian Act is *ultra vires.*" So, in the case of *Valin* v. *Langlois*,[3] their lordships refused leave to appeal from the judgment of the Supreme Court of Canada in that case wherein the judges had held unanimously that the Dominion Controverted Elections Act, 1874, which conferred upon the provincial Courts jurisdiction with respect to controverted elections to the Dominion House of Commons, was valid. Their lordships stated that there is nothing in the British North America Act to raise a doubt about the power of the Dominion parliament to impose new duties upon the existing provincial Courts, or to give them new powers, as to matters which do not come within the subjects assigned exclusively to the legislatures of the provinces. And in *In re Henry Vancini*,[1] referred to above, Sedgewick, J., delivering the judgment of the Court, says: "Where once the parliament of Canada has given jurisdiction to a provincial Court, whether superior or inferior, or to a judicial officer, to perform judicial functions in the adjudicating of matters over which the parliament of Canada has exclusive jurisdiction, no provincial legislation, in our opinion, is necessary, in order to enable effect to be given to such parliamentary enactments." There is a point of distinction here between our Constitution and that of the United States, where Congress cannot vest jurisdiction in State Courts, nor the State legislatures give jurisdiction to the Federal Courts.[4]

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[1] Per Sedgewick, J., in *In re Henry Vancini* (1904), 34 S. C. R. 621.

[2] *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1912] A. C. 571, at pp. 584, 587.

[3] (1879) 5 App. Cas. 115. As to this see also *Kennedy* v. *Purcell*, before the Privy Council, July 7th, 1888, noted at length in Wheeler's Confederation Law of Canada, at pp. 314-7, refusing leave to appeal from the decision of the Supreme Court of Canada in a Dominion election matter, and citing in support *Théberge* v. *Landry* (1876), 2 App. Cas. 102, and *Valin* v. *Langlois*, but not deciding any more than in those cases, the abstract question of the prerogative right to entertain an appeal in such a matter.

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[4] For other cases of the Dominion parliament imposing duties upon provincial Courts and officials, see Law of Legislative Power in Canada, pp. 512-517.

The Supreme Court has even held,[5] that the Dominion parliament could confer a new jurisdiction upon the British Vice-Admiralty Court, though an Imperial Court. But two of the judges expressed the view that the Court of Vice-Admiralty might, if it saw fit, decline the jurisdiction conferred upon it by the legislature of the Dominion. *Sed quære.* And in a very recent case[6] the Privy Council have held that the Dominion parliament could impose upon a municipality the duty of contributing to the cost of protecting, by gates or otherwise, level crossings of railways subject to Dominion jurisdiction. As, however, Ritchie, C.J., pointed out in *Mercer* v. *Attorney-General of the Dominion,*[7] there is not to be found one word in section 91 of the British North America Act, expressing or implying a right in the Dominion parliament to interfere with provincial executive authority, when acting, of course, under valid provincial Acts and in connection with matters proper to exclusive provincial jurisdiction.

As, then, the Dominion parliament can impose jurisdiction and duties upon provincial Courts in reference to subjects within its exclusive jurisdiction, so, also, there seems little doubt that it could in such matters take away jurisdiction over such subjects from the provincial Courts, and that Taschereau, J., is right when he says,[8]: "I see in the British North America Act, many instances where Parliament can alter the jurisdiction of the provincial Civil Courts. For instance, I am of opinion that Parliament can take away from the provincial Courts all jurisdiction over bankruptcy and insolvency, and give that jurisdiction to Bankruptcy Courts established by such Parliament. I, also, think it clear that Parliament can say, for instance, that all judicial proceedings on promissory notes and bills of exchange shall be taken before the Exchequer Court or before any other Federal Court. This would be, certainly, interfering with the jurisdiction of provincial Courts. But I hold that it has the power to do so *quoad* all matters within its authority. . I read sub-section 14 of section 92 of the British North America Act,[9] as having no bearing on the jurisdiction of the Courts in the matters not left to the provincial legislature." And, of course, section 101 of the British North America Act, which gives the parliament of Canada power to provide for the establishment of additional Courts for the better administration of the laws of Canada, must not be forgotten in this connection.[9a]

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[5] *Attorney-General of Canada* v. *Flint* (1884), 16 S. C. R. 707, 3 R. & G. 453. On Admiralty Jurisdiction in the Dominions, see Keith's Responsible Government (1912), Vol. 3, pp. 1348-56.

[6] *City of Toronto* v. *Canadian Pacific R. W. Co.*, [1908] A. C. 54. *Cf. Re Grand Trunk R. W. Co. and City of Kingston* (1903), 8 Ex. C. R. 349.

[7] (1881), 5 S. C. R. at p. 638.

Valin v Langlois

And it would appear that, in matters within their sphere, provincial legislatures can impose duties upon Dominion officials in certain cases.

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[8] *Valin* v. *Langlois* (1879), 3 S. C. R. at p. 76.

[9] Sub-section 14 of sec. 92 gives the provincial legislatures exclusive power to make laws in relation to the administration of justice in the provinces, including the constitution, maintenance, and organization of provincial Courts, both of Civil and of Criminal jurisdiction. See, however, *infra*, pp. 553-5.

[9a] See as to section 101, *infra*, pp. 672-688.

For in *In re County Courts of British Columbia,*[10] it was held that the Supreme Court of British Columbia had power, under No. 14 of section 92,[11] to enact that a County Court Judge appointed for one district might, under certain circumstances, act as judge of another district, and that, until a County Court judge of Kootenay had been appointed, the judge of the County Court of Yale should act as such.

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[10] (1872), 21 S. C. R. 446.

[11] See *supra*, p. 157, n. 9.

CHAPTER XV.

GENERAL CHARACTER OF PROVINCIAL POWERS.

1. None except the enumerated ones.—The provincial legislatures have no powers except the enumerated powers which are given to them by the British North America Act. They cannot legislate beyond the prescribed subjects. The Privy Council have, in more than one judgment, clearly affirmed this proposition,[1] and in *Bank of Toronto* v. *Lambe,*[2] they state that they "adhere to the view which has always been taken by the Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the Parliament." And this entirely conforms to the language of Lord Monck's despatch to the Secretary of State of November 7th, 1864,[3] transmitting the Quebec Resolutions, where he says of the provincial legislatures: "To these local bodies are to be entrusted the execution of certain specified duties of a local character, and they are to have no rights or authority beyond what is expressly delegated to them by the Act of Union"; and also to that of Mr. Adderley, Under-Secretary of State for the Colonies, in moving the second reading of the British North

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[1] *Citizens' Insurance Co.* v. *Parsons* (1881), 7 App. Cas. at p. 109; *Russell* v. *The Queen* (1882), 7 App. Cas. at p. 836.

[2] (1887), 12 App. Cas. at pp. 587-8.

[3] Can. Sess. Pap., 1865, Vol. 3, No. 12.

America Bill in the House of Commons, on February 28th, 1867: "The power of the provincial legislatures, in reference to legislation, will be confined to a certain number of specified subjects."[4] But it must, of course, be remembered that No. 16 of section 92, gives them a general power to make laws in relation to 'all matters of a merely local or private nature in the province.'[4a]

We may notice here, also, the words of Ramsay, J., in *Dobie* v. *Temporalities Board,*[4b]:—"There is a sort of floating notion that by conjoint action of different legislatures the incapacity of a local legislature to pass an Act may be in some sort extended. I cannot understand anything more clear than this, that the local legislatures by corresponding legislation cannot in any degree enlarge the scope of their powers." Uniformity of legislation on provincial subjects can, of course, be produced in different provinces by the respective legislatures enacting similar laws, but it is abundantly clear that the sphere of law making power of each legislature remains identically the same as before.[4c]

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[4] Hans. 3rd Ser., Vol. 185, p. 1167.

[4a] See *supra*, pp. 140-3; *infra*, pp. 627-9.

[4b] (1880) 3 L. N. at p. 250.

[4c] It is no doubt quite true, as Mr. Edward Blake said in his argument in *St. Catharines Milling and Lumber Co.* v. *The Queen,* sometimes termed the Ontario Lands case, that:—"Inherent in the federal form there is with its advantages, great as they are, what may be deemed a defect,—it has the defects of its qualities; and there are some things which cannot at all be done, or at any rate done by the central authority in a federal union, which cannot at all be done *modo et formâ* in which they may be done in a legislative union:" see this argument as printed by the press of

2. Inherent powers of legislatures. — Apart, however, from law-making powers, provincial legislatures have, doubtless, by virtue of being legislative bodies at all, such powers and privileges as are necessarily inherent in and incident to such bodies; and, having them, may regulate their exercise by statute or standing rules, if they see fit so to do; as, for example, the power to remove any obstruction offered to the deliberations or proper action of the legislative body during its sittings; some power of suspending members guilty of obstruction and disorderly conduct, but not extending to unconditional suspension for an indefinite time, or for a definite time depending only on the irresponsible discretion of the Assembly itself; and whatever, in a reasonable sense, is necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. The Judicial Committee of the Privy Council have, in several judgments, recognized the existence of such inherent powers in colonial legislatures,[5] although the actual case of a Canadian legislature under the British North America Act exercising them, does not seem, yet, to have come

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"The Budget," 64 Bay Street, Toronto, 1888, at p. 8. And so per Sedgewick, J., in *In re Prohibitory Liqour Laws* (1895), 24 S. C. R. at p. 241, whose views conflict with those of Hughes, Co.J., in *Clemens* v. *Bemer* (1871), 7 C. L. J. at p. 127, *q.v.*

[5] *Doyle* v. *Falconer* (1866), L. R. 1 P. C. 328; *Barton* v. *Taylor* (1886), 11 App. Cas. 197. See, also, *Landers* v. *Woodworth* (1878), 2 S. C. R. at p. 158. As to the public having access to the legislative chamber and precincts of the House of Assembly as a matter of privilege only, under license either tacit or express, which can be revoked whenever necessary in the interest of order and decorum, see *Payson* v. *Hubert* (1904), 34 S. C. R. 400, 36 N. S. 211.

before the Board. Such powers, however, they hold, are protective and self-defensive only, not punitive. And they say, in one case,[6]: "The privileges of the House of Commons, that of punishing for contempt being one, belong to it by virtue of the *lex et consuetudo Parliamenti*, which is a law peculiar to and inherent in the two Houses of Parliament of the United Kingdom. It cannot, therefore, be inferred from the possession of certain powers by the House of Commons, by virtue of that ancient usage and prescription, that the like powers belong to Legislative Assemblies of comparatively recent creation in the dependencies of the Crown. Again, there is no resemblance between a Colonial House of Assembly, being a body which has no judicial functions, and a Court of Justice, being a Court of Record. There is, therefore, no ground for saying that the powers of punishing for contempt, because it is admitted to be inherent in the one, must be taken by analogy to be inherent in the other."[7] So, too, we read in Cooley's Constitutional Limitations,[8] that 'in America the authority of legislative bodies in this regard (*i.e.,* power to punish for contempt), is much less extensive than in England. . American legislative bodies have not been clothed with the judicial function, and they do not, therefore, possess the general power to punish for contempt; but, as incidental to their legis-

See Anson on the origin of the power of the Engl. Parlt. to commit for contempt.

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[6] *Doyle* v. *Falconer* (1866), L. R. 1 P. C., at p. 339.

[7] As to the *lex et consuetudo Parliamenti* not applying to Colonial legislatures, see further per Pollock, C.B., in *Fenton* v. *Hampton* (1858), 11 Moo. P. C. 347, at p. 397.

[8] 6th ed., pp. 159-160.

lative authority, they have the power to punish as contempts the acts of members and others which tend to obstruct the performance of legislative duty, or to defeat, impede, or embarrass the exercise of legislative power.'

However, the practical importance of this subject does not seem very great, so far as our provincial legislatures are concerned, for in the case of *Fielding* v. *Thomas*,[9] the Privy Council have decided that No. 1 of section 92 of the British North America Act, whereby provincial legislatures may exclusively make laws in relation to 'the amendment from time to time, notwithstanding anything in this Act, of the Constitution of the province, except as regards the office of Lieutenant-Governor,' confers the power "to pass Acts for defining the powers and privileges of the provincial legislature." And they held, in this case, a provincial Act *intra vires* which enacted that 'each House shall be a Court of Record, and shall have all the rights and privileges of a Court of Record for the purpose of summarily inquiring into, and (after the lapse of twenty-four hours) punishing the acts, matters, and things herein declared to be violations or infringements of this chapter,' etc., amongst which were libels upon members of either House during the session of the legislature; and prescribed imprisonment for such time during the session of the legislature then being held as might be determined by the House before which such violation or infringement should be inquired into; and this, notwithstanding that criminal law is one of the subjects reserved by the British North America Act for the Dominion parliament. They added, however: "Their lordships are disposed to think that the House of Assembly could not constitute itself a Court of Record for the trial of criminal offences. But, read in the light of the other sections of the Act, and having regard to the subject-matter with which the legislature was dealing, their lordships think that those sections were merely intended to give the House the powers of a Court of Record for the purpose of dealing with breaches of privileges and contempt by way of committal. If they meant more than that, or if it be taken as a power to try or punish criminal offences otherwise than as incident to the protection of members in their proceedings, section 30 could not be supported." They further held, that the provincial legislature had power to provide, as it had done by the Act in question, that members of the House should be relieved from civil liability for acts done and words spoken in the House, whether it could or could not so relieve them from liability to a criminal prosecution.[9a]

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[9] [1896] A. C. 600, at pp. 610-1. See Law of Legislative Power in Canada, pp. 746-749, for Canadian and Australian decisions.

As to the power of the Dominion parliament in respect to these matters, section 18 of the British North America Act, as amended by Imp. 38-39 Vict. ch. 38, expressly provides: "The privileges, immunities, and powers to be held, enjoyed and exercised by the Senate and by the House of Commons, and by the Members thereof respectively, shall be such as are, from time to time, defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers, shall not confer any privileges, immunities, or powers, exceeding those at the passing of such Act, held, enjoyed, and exercised, by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the Members thereof." In *Fielding* v. *Thomas,*[10] the Privy Council remark, as to this:—"It is to be observed that the House of Commons of Canada was a legislative body created for the first time by the British North America Act, and it may have been thought expedient to make express provision for the privileges, immunities, and powers of the body so created, which was not necessary in the case of the existing legislature of Nova Scotia." In the Court below,[11] counsel suggested that it may have been necessary to give this express grant to the Parliament of Canada to exercise the same powers as the English House of Commons, because it is dealing with civil rights.[11a]

[9a] *Cf. Hill* v. *Weldon* (1845), 3 Kerr (N. Br.) 1.

2. Provincial powers co-equal and coordinate.—Co-equal and co-ordinate legislative powers in every particular were conferred by the British North America Act on the provinces. As the Privy Council states in its decision in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick,*[12] the British North America Act placed the Constitutions of all provinces within the Dominion on the same level; and what is true with respect to the legislature of Ontario, is equally applicable to the legislature of New Brunswick. And it may be mentioned in this connection, that a principle appears established with regard to the disallowance of Acts by the Governor-General, that where Acts of doubtful validity have been left to their operation in certain provinces, similar Acts passed in other provinces should not afterwards be disallowed.[13]

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[10] [1896] A. C. at p. 610.

[11] 26 N. S. at p. 59.

[11a] See for one view of the construction and effect of section 18, the Memorandum by the late Sir John Bourinot: Hodgins' Prov. Legisl., 1867-1895, App. B., at pp. 1316-7. See, also, *infra*, p. 388. And on the general subject of the privileges and procedure of colonial legislatures, see Keith's Responsible Government in the Dominions, Vol. 1, pp. 441-473.

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[12] [1892] A. C. at p. 442. And see Legislative Power in Canada, pp. 705-9.

[13] Hodgins' Provincial Legislation, 1867-1895, at pp. 244*a*-244*b*, 817. See, however, *supra*. p. 32, n. 8.

CHAPTER XVI.

POWER TO REPEAL OR ALTER STATUTES OF THE OLD PROVINCE OF CANADA.

The powers conferred by section 129 of the British North America Act upon the provincial legislatures of Ontario and Quebec, to repeal and alter the statutes of the old parliament of the province of Canada, are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of that Act; and the power of the provincial legislature to destroy a law of the old province of Canada is measured by its capacity to reconstruct what it has destroyed. And in no case can an Act of the old province of Canada, applicable to the two provinces of Ontario and Quebec, be validly repealed by one of them, unless the nature of the Act is such that it still remains in full vigour in the other. These are, in fact, the very words of the Privy Council, in their judgment in *Dobie* v. *The Temporalities Board.*[1] And so, in that case, the Board for the management of the Temporalities Fund of the Presbyterian Church in Canada being a corporation created for the two provinces and applicable to them both, it was held that it could be altered only by a parliament having power to legislate for those two provinces, that is, by the Dominion parliament. Now, therefore, as the Minister of Justice says, in a recent report to the Governor-General, of November 22nd, 1900,[2]: 'There can be no doubt that the legislature of either of the provinces of Ontario and Quebec has no power to modify or repeal the provisions of the charter of a corporation created by the legislature of the late province of Canada for the purpose of doing business in Upper and Lower Canada.'[3] And it has been held, in a Quebec Court, that a provincial legislature cannot repeal a statute of the old Province of Canada applicable equally to Upper and

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[1] (1882) 7 App. Cas. at pp. 147, 150. Referring to this case in their subsequent judgment in the Liquor Prohibition Appeal, 1895, [1896] A. C. at pp. 366-7, their lordships say: "In that case the legislature of Quebec had repealed a statute continued in force after the Union by section 129" (*sc.* of the British North America Act) "which had this peculiarity that its provisions applied both to Quebec and to Ontario, and were incapable of being severed so as to make them applicable to one of these provinces only. Their lordships held that . . . . it was beyond the authority of the legislature of Quebec to repeal statutory enactments which affected both Quebec and Ontario."

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[2] Provincial Legislation, 1899-1900, p. 16.

[3] For several Canadian cases illustrating sec. 129, see Legislative Power in Canada, pp. 368-371, to which may be added *Lafferty* v. *Lincoln* (1907), 38 S. C. R. 620, over-ruling *Rex* v. *Lincoln* (1907), 5 W. L. R. 301, where it was sought to apply the principle of the Dobie case to an attempt by the new province of Alberta to alter or amend an Ordinance of the Assembly of the North-West Territories in force at the time of the creation of the new province. See, also, *Pearce* v. *Kerr* (1908), 9 W. L. R 504; *Beaulieu* v. *La Cite de Montreal* (1907), R. J. Q. 32 S. C. 97; *McKinnon* v. *McDougall* (1907), 3 E. L. R. 573; *Regina* v. *Peters*, Stev. N. Br. Dig., 3rd ed., p. 138. In *Ex parte O'Neill* (1905), R. J. Q. 28 S. C. 304, at pp. 309-10, referred to *infra*, Saint Pierre, J., held that, although the legislature of Quebec had no power to repeal the Temperance Act, 1864, commonly known as the Dunkin Act, passed by the old province of Canada, and applicable equally to Upper and Lower Canada, this did not debar that legislature from enacting a law having for its object the regulating of the liquor traffic within the limits of its territory, in accordance with its power affirmed and illustrated by *Attorney-General of*

Lower Canada, such repeal only to take effect in so far as that province is concerned.[4] *Sed quaere,* if it was not a case of interfering with a corporation incorporated to do business in both provinces, or controlling a fund administrable in both provinces, but one of repealing provisions of an Act of the old province of Canada which had no application except to local and private matters in the province repealing it.

In this connection, also, it may be well to refer again to the words of Ramsay, J., in *Dobie* v. *Temporalities Board,*[5] quoted *supra,* p. 154.

Manitoba v. *Manitoba License Holders' Association*, [1902] A. C. 73, both statutes taking effect concurrently. In his judgment in *Valin* v. *Langlois* (1879), 3 S. C. R. at pp. 20-2, Ritchie, C.J., referring to section 129 of the British North America Act, says the provincial Courts "are the Courts which were the established Courts of the respective provinces before Confederation, existed at Confederation, and were continued with all laws in force, 'as if the union had not been made,' by the 129th section of the British North America Act, and subject, as therein expressly provided, 'to be repealed, abolished, or altered by the parliament of Canada, or by the legislature of the respective province, according to the authority of the parliament, or of that legislature under this Act.' They are the Queen's Courts bound to take cognizance of and execute all laws whether enacted by the Dominion parliament or the local legislatures, provided always such laws are within the scope of their respective legislative powers." And others of the judges of the Supreme Court refer in this case in like manner to section 129.

[4] *Ex parte O'Neill* (1905), R. J. Q. 28 S. C. 304, at pp. 309-310.

[5] (1880) 3 L. N. at p. 250.

CHAPTER XVII.

DOMINION INTRUSION ON PROVINCIAL AREA.

ANCILLARY LEGISLATION.

1. Indirect interference. — An Act of the Dominion parliament is not affected in respect to its validity by the fact that it interferes prejudicially with the object and operation of provincial Acts, provided that it is not in itself legislation upon or within one of the subjects assigned to the exclusive jurisdiction of the provincial legislature. The Privy Council made this very clear by their judgment in *Russell* v. *The Queen*.[1] The question there was, whether the Canada Temperance Act, 1878, was within the proper competency of the Dominion parliament to pass, and at the place cited, their lordships say: "It appears, that by statutes of the province of New Brunswick, authority has been conferred upon the municipality of Fredericton to raise money for municipal purposes by granting licenses of the nature of those described in No. 9 of section 92 of the British North America Act, and that licenses granted to taverns for the sale of intoxicating liquors were a profitable source of revenue to the municipality. It was contended by the appellant's counsel, and it was their main argument on this part of the case, that the Temperance Act interfered prejudicially with the traffic from which this revenue was derived, and thus invaded a subject assigned exclusively to the provincial legislature. But, supposing the effect of the Act to be prejudicial to the revenue derived by the municipality from licenses, it does not follow that the Dominion parliament might not pass it by virtue of its general authority to make laws for the peace, order, and good government of Canada. Assuming that the matter of the Act does not fall within the class of subjects described in No. 9, that sub-section can in no way interfere with the general authority of the Parliament to deal with that matter." And they point out that the Dominion legislation in question was not in itself legislation within the subject of No. 9 of section 92 of the British North America Act, and that if, because of No. 9 of section 92, Parliament could never legislate with regard to any article or commodity which had or might be covered by such licenses as are therein referred to, it might be that laws necessary for the public good or public safety could not be enacted at all, as being thereby beyond the competency of Parliament, and yet not laws of the character specified in No. 9. It is clear that in *Russell* v. *The Queen*, we have the deliberate conclusion of their Lordships, for in *Hodge* v. *The Queen*,[2] they expressly say that they " do not intend to vary or depart from the reasons expressed for their judgment in that case."

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[1] (1883), 9 App. Cas. at p. 130.

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[2] (1883) 9 App. Cas. 117. For these, and numerous Canadian judgments illustrating the same subject, see Law of Legislative Power in Canada, pp. 425-468.

Powers by implication—Direct intrusion.—In *Russell* v. *The Queen,* it will be noted, the legislation was under the general residuary power of the Dominion parliament, and not under one of the enumerated classes of section 91. It is true, *a fortiori,* that in assigning to the Dominion parliament legislative jurisdiction in respect to the general subjects of legislation enumerated in section 91, the Imperial parliament, by necessary implication, intended to confer on it legislative power to interfere with, deal with, and encroach upon, matters otherwise assigned to the provincial legislatures under section 92, so far as a general law relating to those subjects so assigned to it may affect them, as it may also do to the extent of such ancillary provisions as may be required to prevent the scheme of such a law from being defeated. The Privy Council has established and illustrated this in many decisions.[3] Thus, to take a recent judgment, in *The Bell Telephone Case,*[4] their lordships held that, if a work or undertaking falls within item 29 of section 91, being within the exceptions to item 10 of section 92 (whereby provincial legislatures are given the exclusive power to make laws in relation to local works and undertakings other than certain specified classes), the Dominion parliament have exclusive jurisdiction, not only to incorporate, but to grant the powers required for the construction and establishment of the proposed work, even if, in granting such powers, there be involved an apparent invasion of matters otherwise within exclusive local jurisdiction. And, as we have seen, Dominion legislation, whether on one of the enumerated classes in section 91, or by way of provisions properly ancillary to legislation on one of the said enumerated classes, will over-

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[3] See *infra,* pp. 167-9. The Privy Council, however, cannot perhaps be said to have encouraged us to go so far as the two dissenting judges in the Australian case of *The King* v. *Barger* (1908), 6 C. L. R. 41, and to say that even the enumerated powers granted to the Federal parliament are to be construed in as full a manner as if the Federal parliament were that of a unitary State. As to the prevailing doctrine of the Australian Courts, see *infra* p. 170, n. 6*b*. See, also, *infra* pp. 169-179. In *Ontario Power Co.* v. *Hewson* (1903), 6 O. L. R. at p.15, Britton, J., says, referring to the Power Company there in question: "If the Dominion, and the Dominion only, has power over the source of supply of water, the thing of use to the company to be chartered, then the Dominion has, of necessity, power to deal in detail with what is necessary to utilize the water supply for purposes beneficial to Canada." He cites *Tennant* v. *Union Bank of Canada,* [1894] A. C. 1, and *Attorney-General of Ontario* v. *Attorney-General of Canada,* [1894] A. C. 189 (for which cases see *infra* pp. 265, 279-281), and, also, *Regina* v. *County of Wellington* (1890), 17 A. R. 421, at p. 444, where Osler, J.A., says that the grant of general legislative power

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carries with it the power to enact minor provisions incidental to the general purpose of the Act. The Act in question was a Dominion Act providing for the winding-up of the insolvent Bank of Upper Canada, and was held *intra vires* under the Dominion power over bankruptcy and insolvency, notwithstanding that it contained certain minor provisions regarding the execution and registration of instruments, which, it was objected, trenched upon the limits of local powers, but which were all incidental to the principal purpose of the Act. S. C. in App. *sub nom. Quirt* v. *The Queen* (1891), 19 S. C. R. 510. Britton, J., also cites *Bradburn* v. *Edinburgh Life Assurance Co.* (1903), 5 O. L. R. 657, noted *infra* p. 275. In *In re Railway Act* (1905), 36 S. C. R. 136, at p. 143, Davies, J., says:—"I do not think the Courts should be astute to discover reasons to annul the legislation of parliament on a subject matter within its exclusive jurisdiction, even if, in the exercise of its powers, it does trench upon the subjects generally within the provincial jurisdiction, or if plausible arguments can be urged that, from that one aspect, such legislation is not necessary to control effectively the subject matter of such legislation."

[4] [1905] A. C. 52. And see *Kerley* v. *London, etc., Co.*, *infra* p. 457, n.

ride and place in abeyance provincial legislation which directly conflicts with it.[4a]

In their judgment on the Liquor Prohibition Appeal, 1895,[5] however, the Privy Council point out the distinction between the scope of the Dominion parliament when legislating on the enumerated subjects in section 91, and when legislating under its general residuary power. They state that it is free to deal with matters assigned to the provinces " in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91,"[5a] but they add, " to those matters which are not specified among the enumerated subjects of legislation, the exception from section 92, which is enacted by the concluding words of section 91,[6] has no application; and in legislating with regard to such matters, the Dominion parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by section 92;" and they proceed to explain their meaning to be that such legislation by Parliament, as is last referred to, "ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92;" and ought not to be passed "in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion." Parliament, they say, does not derive jurisdiction from the introductory provisions of section 91 "to deal with any matter which is in substance local or provincial, and does not truly affect the interest of the Dominion as a whole." At the same time their lordships add that they "do not doubt that some matters in their origin local and private, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian parliament in passing laws for their regulation or abolition in the interests of the Dominion."[6a]

[4a] *Supra* pp. 123-7.

[5] [1896] A. C. 348, 360-1.

[5a] And so, again, in their recent judgment in *City of Montreal* v. *Montreal Street Railway*, [1912] A. C. at p. 343.

[6] 'Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.' *Infra* pp. 138-140, 168.

2. Rule of necessity as applied to such Dominion interference. — When it is sought, however, to find some rule regulating the power of the Federal parliament thus incidentally to deal with matters which are under the jurisdiction of the provinces, it does not appear that any has been, or, it may be, can be, formulated beyond this, that such power does not extend any further than is reasonable to enable it to legislate on the general subjects committed to its jurisdiction by the British North America Act.[6b] And, to adopt the words of Palmer, J., in *In re De Veber,*[7]: "perhaps the Act can present no more difficult subject for construction than where to draw the line. Lawyers attempting this must always be met with the difficulty that they are, to some extent, allowing the Dominion parliament to exercise legislative powers that are by the express words of the Act, not only given to another legislative body, but given to it exclusively." Light is to be found, however, on the problem in the recent Privy Council decision in *City of Toronto* v. *Canadian Pacific R.W. Co.*[8] There, the question before the Board was, whether sections 187 and 188 of the Dominion Railway Act, 1888, which empowered the Railway Committee of the Privy Council to order any crossing over a highway of a railway subject to its jurisdiction, to be protected by gates or otherwise, and to apportion the cost of providing and maintaining such protection between the railway company and 'any person interested,' were *intra vires.* Relying on these provisions, the Railway Committee had ordered the Canadian Pacific Railway Company to provide gates and watchmen at certain level crossings in Toronto, and had further directed that one-half of the costs attending the placing and maintaining of the gates and watchmen be contributed by the City of Toronto. As appears by the verbatim report of the argument before their lordships,[9] it was strongly argued that to justify the Dominion parliament infringing on the provincial area by ancillary legislation, it must be "a thing absolutely necessary, or incidental, to the particular power given to the Dominion parliament." But the Privy Council seem to have accepted the argument by Sir Robert Finlay:—"It is said it is not necessary the municipality should pay, but it is necessary that some one should pay. If there are three or four different ways of doing a thing, you may always say no one of them is necessary, because you may take another course, but here, if someone must pay, the Dominion must provide some machinery for throwing the liability in some quarter. That is necessary. The precise choice of the way of doing it is a matter that is necessarily left to the legislature and to those to whom they entrust the authority." In holding the legislation *intra vires,* their lordships say, at p. 58: "The sections impugned do no more than provide reasonable means for safeguarding, in the common interest, the public and the railway, which is committed to the exclusive jurisdiction of the legislature which enacted them, and were, therefore, *intra vires.* If the precautions ordered are reasonably necessary, it is obvious that they must be paid for, and in the view of their lordships there is nothing *ultra vires* in the ancillary power conferred by the sections on the Committee to make an equitable adjustment of the expenses among the persons interested."

[6a] See, *infra* p. 294, cases illustrating the point that, in conferring some benefit or creating some right, the Dominion parliament may impose as a condition upon those who avail themselves of that benefit, or that right, something which it would be *ultra vires* for it to enact otherwise. And *cf.*, in the same way, as to provincial legislatures: *Kerley* v. *London and Lake Erie Transportation Co.* (1912), 26 O. L. R. 588. See, also, *infra* pp. 136-8.

[6b] In Australia the Courts have, it would appear, established a doctrine of an implied prohibition of interference by the Commonwealth parliament in matters reserved to the State parliaments. The decisions, which are referred to in Mr. Keith's Article on the Legal Interpretation of the Commonwealth Constitution (Jl. of Comp. Legisl., N.S., Vol. XII., pp. 105-127), may nevertheless be of some assistance in connection with the subject under discussion.

[7] (1882) 21 N. B. at p. 425.

[8] [1908] A. C. 54. *Cf. Re Grand Trunk R. W. Co. and City of Kingston* (1903), 8 Ex. C. R. 349.

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[9] Report by Marten, Meredith, Henderson, and White, shorthand writers.

But, how difficult it may be, in any particular case, to decide whether Dominion legislation is so incidental to legislation by it under one of its enumerated powers as to be *intra vires,* although trespassing *pro tanto* on provincial jurisdiction, is well illustrated by *Montreal Street R. W. Co.* v. *City of Montreal,*[10] where four supreme Court judges held that the Dominion parliament could not legislate as to through traffic over a provincial railway connecting with a federal railway as being incidental to its legislative power over the federal railway, and two held that it could.[11] Duff, J., at pp. 232-3, observes " that it might be convenient that the Dominion and the provincial railway should have joint traffic arrangements, and these should be under a single control, does not advance the argument " (*sc.,* that the Dominion had power to control the through traffic over the provincial railway.)

Those judges, however, in this last case, who speak as though Dominion legislation intruding on the provincial areas must be " necessarily incidental " to the exercise of a Dominion enumerated power, seem to suggest a more restrictive principle than the Privy Council judgment just referred to countenances. Anglin, J. (p. 248), in his dissenting judgment, holds it sufficient if the intrusive legislation is " eminently germane, if not absolutely necessary," to the main legislation. Yet when, on appeal to the Privy Council, the judgment of the Supreme Court was affirmed,[11a] their lordships say (at pp. 344-5): "It must be shewn that it is necessarily incidental to the exercise of control over the traffic of a federal railway, in respect to its giving an unjust preference to certain classes of its passengers or otherwise, that it should also have power to exercise control over the 'through' traffic of such a purely local thing as a provincial railway properly so called, if only it be connected with a federal railway. . But it is not to be assumed that the provincial railway companies would in the reasonable conduct of their business refuse to make such agreements with federal railway companies as would enable the latter to discharge the obligations which might be placed upon them under this section," (*sc.* the 317th section of the Dominion Railway Act as to through traffic and undue preference) " and still less is it to be assumed that the provincial legislature would fail to exercise their own legislative powers to compel recalcitrant companies over which they had control to enter into such agreements if they refuse to do so. As long as it is reasonably probable that the provincial companies will enter into such agreements, or will be coerced to enter into them by the provincial legislature which controls them, it cannot be held, their lordships think, that it is necessarily incidental to the exercise by the Dominion parliament of its control over federal railways that provincial railways should be coerced by its legislation to enter into these agreements in the manner in which it sought to coerce the Street Railway Company in the present case to enter into the agreements specified in the order appealed from. There is not a suggestion in the case that the 'through' traffic between this federal and this local line, or between any other federal or local line, had attained such dimensions before this Railway Act was passed as to affect the body politic of the Dominion. If it had been so, the ready way of protecting the body politic was by making such a statutory declaration in any particular case or cases as was made in reference to the Park line" (*i.e.,* that, it was a work 'for the general advantage of Canada,' under No. 10 (c) of section 92, and No. 29 of section 91). "The right contended for in this case is in truth the absolute right of the Dominion parliament wherever a federal line and a local provincial line connect, to establish, irrespective of all consequences, this dual control over the latter line whenever there is through traffic between them, at least of such a kind as would lead to unjust discrimination between any classes of the customers of the former line. In their lordships' view this right and power is not necessarily incidental to the exercise by the parliament of Canada of its undoubted jurisdiction and control over federal lines, and is, therefore, they think, an unauthorized invasion of the rights of the legislature of the province of Quebec."

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[10] (1910) 43 S. C. R. 197.

[11] Anglin, J., discusses the whole subject at great length at pp. 238-249. Cf. per Idington, J., at pp. 220-221; per Duff, J., at p. 229.

[11a] [1912] A. C. 333.

It is true, also, that in their former judgment in the matter of the Liquor Prohibition Appeal, 1895,[12] the Privy Council say that the parliament of Canada has power to deal with local or private matters referred to in the sixteen classes enumerated in section 92, "in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of section 91." Still this, probably, must not be pressed to mean that in all cases the Dominion legislation must be, in a strict sense of the word, *necessarily* incidental to the exercise of the power under which it is acting. Rather in their recent decision, just referred to, of *City of Toronto* v. *Canadian Pacific R. W. Co.*,[13] they seem to vindicate Rose, J., in the view he expresses in *Doyle* v. *Bell*,[14]: "I do not understand by the use of the word 'necessary,' as found in various decisions and textbooks, that it is meant to lay down the doctrine that to bring within the powers of the Dominion legislature any provision of an enactment respecting a subject within the exclusive jurisdiction of such legislature, and which provision might affect civil rights, it must necessarily appear that without such provision it would be impossible to carry into effect the intention of the legislature, or that probably no other provision would be adequate. On the contrary it seems to me that if such provision might, under certain circumstances, be beneficial, and assist to more fully enforce such legislation, then it must, at all events, on an appeal to the Courts, be held to be necessary, that is, necessary in certain events. Surely the legislature must be allowed some, and in my opinion, a very wide, discretion as to the mode of enforcing its own enactments. It cannot be said that the Courts are to sit in judgment on the exercise of such discretion, and to dictate to the legislature whether they shall adopt this or that mode, because, in the opinion of the Courts, one mode is more convenient or better, or at least as well adapted to effect the purpose of the legislature."

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[12] [1896] A. C. 348.

[13] [1908] A. C. 54.

[14] (1884) 11 O. A. R. at p. 335.

And this view finds support in that taken in the United States in a somewhat parallel case. Story, in his work on the Constitution of the United States,[15] discussing the clause in the Constitution (Art. 1, sec. 8 (18)), which gives power to Congress ' to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all others powers vested by this Constitution in the Government of the United States, or in any department or officer thereof,' observes: ' The relation between the measure and the end, between the nature of the means employed towards the execution of a power and the object of that power, must be the criterion of constitutionality, and not the greater or less of necessity or expediency. If the legislature possess a right of choice as to means, who can limit that choice? Who is appointed an umpire or arbitrator in cases where a discretion is confided to a Government? The very idea of such a controlling authority in the exercise of its power is a virtual denial of the supremacy of the Government in regard to its powers. It repeals the supremacy of the national Government proclaimed in the Constitution.' And again (*ibid.* at p. 147) : ' Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to the end, and which are not prohibited, but are consistent with the letter and spirit of the instrument,'' (*sc.* the Constitution) '' are constitutional.''

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[15] 5th ed., Vol. 2, at p. 143.

And in their judgment above referred to in *City of Toronto* v. *Canadian Pacific R. W. Co.,*[16] their lordships' language suggests the principle that in estimating the relation of Dominion legislation to the provisions of the British North America Act relating to provincial powers it is proper to remember that some points of view may be more natural in a young and growing community interested in developing the resources of a vast territory as yet not fully settled, than they could possibly be in the narrow and thickly populated area of such a country as England. And Davies, J., in *In re Railway Act,*[17] in the same way, says that in such matters we should bear in mind the actual conditions of Canada. Considering the question of what subjects bearing upon the maintenance and operation of Dominion railways '' must either wholly or partially come within the ambit of the Parliament alone capable of calling these corporations into being and effectively regulating their operation,'' he says:—'' We cannot ignore, in determining what are and what are not fairly within the ambit, the actual existing conditions in Canada. Here are at least three great railway corporations, either already transcontinental, or rapidly becoming so. Their operations are of a national character and importance. Their employees number many thousands. The Unions of these employees amongst themselves, for the better support and protection of their interests, and the amalgamation, in some cases, of their Unions with the Labour Unions of the neighbouring Republic, add additional strength to the argument for giving a broad and liberal construction to the plenary powers of legislation vested in the Dominion parliament so as to ensure some degree of uniformity in its exercise.''

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[16] [1908] A. C. 54, at p. 58.

[17] (1905) 36 S. C. R. 136, at pp. 145-6. As to this case see *infra* p. 348.

Another case which illustrates how difficult it may sometimes be to determine whether, in legislating upon subjects entrusted to its jurisdiction by section 91, the Dominion parliament has or has not unduly encroached upon the sphere of provincial jurisdiction, is *McArthur* v. *Northern Pacific Junction R. W. Co.,*[18] in which Street, J., Hagarty, C.J.O., and Osler, J.A.,[19] held that section 27 of R. S. C. 1886, c. 109, whereby all actions for indemnity for any damage or injury sustained by reason of any railway under Dominion control must be commenced within six months, was *intra vires* of the Dominion parliament, being in accordance with the customary legislation in similar cases both in Canada and England; while Burton, J.A., and Maclennan, J.A., held that it was *ultra vires,* as being an unnecessary interference with property and civil rights and with procedure in the province, the latter denying that any such clause is to be found in the railway legislation of either England or the United States. In the New Brunswick case, however, of *Levesque* v. *New Brunswick R. W. Co.,*[20] the Supreme Court of that province also held the same section to be *intra vires* in prescribing the limitation. King, J., indeed, (at p. 604), expresses a doubt whether that part of it which authorises the railway company, in an action for damages, to plead the general issue and give the special matter in evidence, is also *intra vires,* but Allen, C.J., (at p. 613), holds both matters alike to be incident to the right of the Dominion parliament to legislate on the subject of railways.

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[18] (1888-90) 15 O. R. 723, 17 O. A. R. 86.

[19] Osler, J.A., refers to his judgment in this case, and reiterates the view expressed therein, in *Re Canadian Pacific R. W. Co. and County and Township of York* (1898), 25 O. A. R. at pp. 72-3.

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[20] (1889) 29 N. B. 588.

CHAPTER XVIII.

PROVINCIAL INTRUSION ON DOMINION AREA.

As to the question whether provincial legislatures have any right on their side to intrude upon the Dominion area, the first consideration which presents itself is that they have not the advantage of the strong position in which the Dominion parliament is placed by the *non obstante* clause of section 91 of the British North America Act, nor of the concluding clause of that section which we have already dealt with;[20a] nor does there seem to be any authority to support the view that provincial legislatures can at all legislate upon any of the enumerated classes of subjects in section 91, properly understood, by way of provisions ancillary to their own Acts. What judicial authority there is[1] does not seem to carry the matter further than this, that whatever powers the provincial legislatures have as included, *ex vi termini,* within the enumerated classes in section 92 when properly understood, those powers they may exercise, although in so doing they may incidentally touch or affect something which might otherwise be held to come within the exclusive jurisdiction of the Dominion parliament under some of the enumerated classes in section 91. As the Privy Council laid down in *Bank of Toronto* v.

[20a] *Supra* pp. 138-140, 168.

[1] For the cases, which are all Canadian decisions, see Law of Legislative Power in Canada, pp. 454-468.

Lambe,[2] where a power falls within the legitimate meaning of any class of subjects reserved to the local legislatures by section 92, the control of those bodies is as exclusive, full, and absolute as is that of the Dominion parliament over matters within its jurisdiction. The matter would seem to be one entirely of construction of the Act; that is, of properly defining the various classes of subjects enumerated in section 92, the general language there used having to be modified by reason of the language used in section 91. And, as one learned judge puts it,[3] the mere fact that an Act of a provincial legislature may incidentally touch some of the classes of subjects enumerated in section 91, although, in fact, such subjects are foreign to the purposes of such Act, and not necessarily and directly involved in the legislation, does not make the Act really one within or upon that class of subjects. Thus, when the Minister of Justice objected to an Ontario Act which provided that a railway company thereby incorporated, might become a party to promissory notes and bills of exchange, and how such notes and bills might be made, accepted or endorsed so as to be binding on the company, as an infringement on the Dominion power, under No. 18 of section 91, over 'bills of exchange and promissory notes,' Mr. Mowat, as he then was, the provincial Attorney-General, replied that the Dominion power is "not incompatible with the right of the provincial legislature to confer authority on a corporation to become a party to instruments of this nature as a matter incidental to such corporation. The object of the legislation is not to alter or interfere with the general law in respect to those subjects, but to invest the company with the powers necessary for its due working,'' and he refers to the fact that legislation of this nature has, for twenty years, passed unchallenged as entitled to weight as shewing that it is *intra vires.* And we may compare the language of the Privy Council in the *Fisheries* case, *supra,* p. 131.

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[2] (1887), 12 App. Cas. at p. 586.

[3] Allen, C.J., in *The Queen* v. *City of Fredericton* (1879), 3 P. & B. at p. 187.

The question of whether provincial legislatures possess, under any circumstances, the power to intrude on the area occupied by the Dominion enumerated powers, is, of course, quite a different one to that of their power to intrude on the area which the Dominion parliament might occupy under its residuary legislative power to make laws for the peace, order, and good government of Canada. So far from this residuary power of legislation residing in the Dominion 'notwithstanding anything' assigned to the provinces, it will be remembered that exactly the reverse is the case, namely, that that power is given only in relation to matters not coming within the classes of subjects assigned exclusively to the provinces; and, therefore, the provinces might be held to have power incidentally to invade this area, without having any such power to invade the area of any of the enumerated Dominion subjects.[4]

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[4] See Legislative Power in Canada, pp. 461-2.

Finally, we may probably accept as unquestionable the *dicta* of Hagarty, C.J.O., in *Regina* v. *Wason*,[5] that we can, as to both Dominion and provincial jurisdictions, " adhere to the rule that where either has the right to legislate on a named subject, it must by necessary implication, be held that all powers are given fully to carry out the object of the enactment, although subjects such as civil rights and procedure, civil or criminal, may be apparently interfered with. The exclusive right to deal with the specific subjects remains wholly unaffected—the carrying the legislation into practical effect and providing necessary penalties for its observance is alone in question."

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[5] 17 O. A. R. at p. 232.

CHAPTER XIX.

PROVINCIAL INDEPENDENCE AND AUTONOMY.[1]

If, on due construction of the British North America Act, a legislative power falls within section 92, it is not to be restricted or its existence denied because by some possibility it may be abused or may limit the range which otherwise would be open to the Dominion parliament. Whatever power falls within the legitimate meaning of the classes in section 92, is what the Imperial parliament intended to give; and to place a limit on it, because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties

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[1] In two Newfoundland decisions (J. W. Withers, Queen's Printer, St. John's, N.F., 1897), *Rhodes* v. *Fairweather* (1888), at p. 321, and *Queen* v. *Delepine* (1889), at p. 378, the question of the territorial limits of the jurisdiction of the local legislature is discussed, and found to extend to, but not beyond, three miles outside of the line drawn from headland to headland of the bays of Newfoundland. See *infra* p. 259, n. In *Rex* v. *Meikleham* (1905), 11 O. L. R. 366, it is pointed out that the province of Ontario extends to the line in Lake Huron which forms the western boundary of the British possessions and the easterly boundary at that point of the United States of America, and the whole area forms part of the province of Ontario, and is under its legislative authority and control; and that, therefore, the Ontario legislature had authority to enact that no intoxicating liquor should be sold or kept for sale in any room or place on any vessel navigating any of the Great Lakes under penalties to be enforced as thereunder provided, as applied to an offence committed within the said territorial limits, notwithstanding the contention that the Great Lakes form part of the high seas, and that the jurisdiction with regard to offences committed upon them is in the Admiralty, and not in any Court of Ontario, except in so far as that jurisdiction has been confirmed by Imperial authority. Meredith, C.J., delivering the judgment of the Court, says, at pp. 373-4: "If it had been that this steamer 'Greyhound,'" (the steamer on which the liquor in question has been sold) "was being navigated by an American citizen, as he had a right to navigate it on the waters of Lake Huron, and had been passing from the City of Detroit to Sault Ste. Marie, and in the course of its journey had proceeded for some distance upon the Canadian side of the lake, and, therefore, within the territory of Ontario, I should require time to consider whether in that case the license law of the province could be held to apply to acts

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done on board the vessel. Here, however, the case is entirely different. The vessel had come to the harbour of Goderich; it was not exercising the right of navigation enjoyed by the citizens of the United States of America as well as by the subjects of His Majesty in the way I have mentioned; it was being used for an excursion which went out from the port of Goderich for a few miles and returned to that port; and I may say in passing that it has never been doubted even before the passing of the Imperial statute which followed *Regina* v. *Keyn* (1876), 13 Cox C. C. 403, that with regard to harbours, bays, and bodies of water *intra fauces terræ*, as it is called in the cases, there is local jurisdiction in the country to which they belong. I think we may distinguish this case from those which have been cited, and properly rest our judgment upon the ground that this was not the case of a foreign ship travelling in the way I have indicated, but was a ship practically in the harbour of Goderich and contravening the local laws which prevailed there, and which, according to the testimony, were known to the applicant, the captain of the vessel, for, upon his own statement, he had applied for a license to the authorities of this country and had failed to obtain it." No province can pass laws to operate outside its own territory; and no tribunal established by a province can extend its process beyond the province so as to subject persons or property elsewhere to its decisions: *Deacon* v. *Chadwick* (1901), 1 O. L. R. 346. As to the parliament of Canada having exclusive jurisdiction to legislate with respect to fisheries within the three-mile zone off the sea-coasts of Canada, and the right of immediate pursuit, see *The Ship 'North'* v. *The King* (1906), 37 S. C. R. 385. 11 Ex. C. R. 141, 11 B. C. 473. As to a Canadian province not being a 'colony or dependency' within the meaning of a clause in a will authorising trustees to invest in any stocks or securities 'of any British colony or dependency,' though this would not prevent investing in stock issued by any of the Canadian colonies before they were merged in the Union, see *In re Sir S. M. Marion Wilson's Estate*, [1911] 2 Ch. 58, 27 Ti. L. R. 429.

in the construction of the Federation Act.[1a] The Privy Council state and illustrate this in *Bank of Toronto* v. *Lambe*,[1b] and at the same time point out the distinction existing so far as concerns limiting the range which would be open to the Federal power, between the Constitution of the United States and that of the Dominion of Canada. Having decided in favour of the validity of a certain Act passed by the Quebec legislature in 1882, whereby certain direct taxes were imposed on all banks doing business in that province, they say at the passage referred to: " Then it is suggested that the legislature may lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power of Parliament to erect banks. But their lordships cannot conceive that, when the Imperial parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they could be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes. There are obvious reasons for confining their power to direct taxes and licenses because the power of indirect taxation would be felt all over the Dominion. But, whatever power falls within the legitimate meaning of classes 2 and 9" (*sc.* of section 92), "is, in their lordships' judgment, what the Imperial parliament intended to give; and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties in the construction of the Federation Act. Their lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great Judge in a parallel case. But he was dealing with the Constitution of the United States. Under that Constitution, as their lordships understand, each State may make laws for itself uncontrolled by the Federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a Constitution Chief Justice Marshall found one of those limits, at the point at which the action of the State legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the provincial legislatures under section 92, which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under section 91. It is quite impossible to argue from the one case to the other. Their lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and, at the same time, provides for the federated provinces a carefully balanced Constitution, under which no one of the parts can pass laws for itself except under the control of the whole, acting through the Governor-General. And the question they have to answer is, whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within section 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which would otherwise be open to the Dominion parliament.''[1c]

[1a] As to the futility of a provincial legislature attempting to fetter its own future action, see the report of Sir John Thompson, as Minister of Justice, of February 17th, 1894: Hodgins' Prov. Legisl., 1867-1895, pp. 1227-8.

[1b] (1887), 12 App. Cas. at pp. 586-7. See, following this decision, *Great North Western Telegraph Co.* v. *Fortier* (1903), R. J. Q. 12 Q. B. 405. *Cf.* the words of Mr. Asquith on the 3rd reading of the Home Rule Bill in the British House of Commons, on January 15th, 1913:—" Given perversity on one side, and pedantry on the other, there is not a Constitution in the world could not be wrecked in a week."

As regards the contrast here suggested between the Constitution of the United States and our own, it is manifest that, by reason of having certain specified subjects of legislation exclusively assigned to them, provincial legislatures in Canada cannot be so restricted in their action as State legislatures are under the American Constitution. And so in *Liquidators of the Maritime Bank of Canada* v. *The Receiver-Gen-*

[1c] Counsel referring to this passage, on the argument in the recent case of *The Royal Bank of Canada* v. *The King*, [1913], A. C. 283, Lord Haldane, L.C., is reported as saying:—"There is only an exception to that in this respect as Lord Herschell himself said in *Colquhoun* v. *Brooke*, in the House of Lords, (1889), 14 App. Cas. 493, to the effect that if there are two constructions of an Act, and one is contrary to peace, and international comity, and the other is in accordance with it, you would prefer that which is consistent with it: Transcript from notes of Marten, Meredith & Co., 8 New Court, London, 3rd day, at p. 64.

eral of New Brunswick,[2] their lordships say: "The object of the British North America Act was neither to weld the provinces into one, nor to subordinate provincial Governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. . In so far as regards those matters which, by section 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act. . It possesses powers not of administration merely, but of legislation in the strictest sense of that word; and within the limits assigned by section 92 of the Act of 1867, these powers are exclusive and supreme."

And now, in *Abbott* v. *City of St. John,*[3] it has been held that No. 2 of section 92 of the British North America Act, giving provincial legislatures exclusive power of legislation in respect to direct taxation within the province, is not in conflict with No. 8 of section 91, which provides that the Dominion parliament shall have exclusive legislative authority over the fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada; and that a civil or other officer of the Government of Canada may be lawfully taxed in respect to his income as such by the municipality in which he resides; thus overruling several previous decisions, amongst which *Leprohon* v. *City of Ottawa,*[4] may be specially mentioned. The Privy Council decision in *Webb* v. *Outrim,*[5] was much relied on in the judgments. But when, in 1904, the Quebec legislature passed a Bill which the Lieutenant-Governor thought might be construed as rendering liable to seizure the salaries of public officers appointed by the Federal Government, he reserved it for the signification of the pleasure of the Governor-General, and by report of October 29th, 1904, the Minister of Justice expressed his opinion that for the above reasons the Bill should not receive effect at the hands of the Dominion Government, which was approved by Order-in-Council.[6]

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[2] [1892] A. C. at pp. 441-3.

[3] [1908] 40 S. C. R. 597.

Another Privy Council decision which illustrates the principle of Constitutional law under discussion is the *Brewers and Maltsters' Association of Ontario* v. *The Attorney-General of Ontario,*[7] wherein they held, affirming the decision of the Ontario Court of Appeal, that an Ontario Act requiring every brewer, distiller, or other person, though duly licensed by the Government of Canada for the manufacture and sale of fermented, spirituous and other liquors, to take out licenses to sell the liquors manufactured by them, and pay a license fee therefor, was *intra vires.* And in the still later case of *Attorney-General of Manitoba* v. *Manitoba License Holders' Association,*[8] their lordships held *intra vires,* the Liquor Act of Manitoba, 63-64 Vict. ch. 22, which prohibited all use in Manitoba of intoxicating liquors as beverages, and included divers prohibitions and restrictions affecting the importation, exportation, manufacture, keeping, sale, purchase and use of such liquors. They held that its subject was and had been dealt with as a matter of a merely local nature in the province within the meaning of No. 16 of section 92, and that it was, therefore, constitutional, notwithstanding that in its practical working it must interfere with Dominion revenue, and indirectly, at least, with business operations outside the province.

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[4] (1877-1878), 40 S. C. R. 478. As to the Dominion power to impose a tax by way of license as a condition of the right to fish, under their general taxing power, notwithstanding any interference thereby with the provincial power to tax by similar licenses, see the *Fisheries* case, [1898] A. C. 700, at pp. 713-4.

[5] [1907] A. C. 81. See *infra* pp. 419-420.

[6] Provincial Legislation, 1904-1906, p. 12.

[7] [1897] A. C. 231; cf. *Fortier* v. *Lambe* (1895), 25 S. C. 422.

To summarize the whole matter, then, the position seems to be this: although when provincial legislation and Dominion legislation directly conflict with each other, the latter must prevail, and although by virtue of the *non obstante* clause of section 91 of the British North America Act, and the concluding clause of that section, the construction of the enumerated powers conferred upon the Dominion parliament may be said to over-ride the construction of section 92, yet the provinces, under our Constitution, have not, as the several States of the Union have, a general power of legislation subject only to certain specified powers which they themselves have conferred upon the Federal body, but they, as well as the Dominion, have received from one and the same source, namely, the Imperial parliament, certain express powers of legislation upon specified subjects, which are theirs exclusively; and, therefore, their power to legislate upon these specified subjects cannot be denied, as is the case with the States, merely because in doing so they may interfere with or restrict the range of Federal legislation. But, on the other hand, the Dominion Government possesses what the United States Government has not, viz., a veto power over all provincial legislation.[9] And it is quite in harmony with all this, that in *L'Union St. Jacque de Montreal* v. *Belisle,*[10] the Privy Council has laid it down that when the validity of a provincial Act is in question, and it clearly appears to fall within one of the classes of subjects enumerated in section 92 of the British North America Act, the onus is on the persons attacking its validity to show that it does also come within one or more of the classes of subjects specially enumerated in section 91.

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[8] [1902] A. C. 73.

Injustice no ground of invalidity.—As to any objection to either provincial or Dominion legislation on the ground of injustice, it is sufficient to quote the words of the Privy Council in *Union Colliery Co.* v. *Bryden,*[11]: " In assigning legislative power to the one or the other of these parliaments, it is not made a statutory condition that the exercise of such power shall be, in the opinion of a Court of law, discreet. In so far as they possess legislative jurisdiction, the discretion committed to the parliaments of the Dominion or of the provinces, is unfettered. It is the proper function of a Court of law to determine what are the limits of the jurisdiction committed to them; but, when that point has been settled, Courts of law have no right whatever to enquire whether their jurisdiction has been exercised wisely or not"; and their words in the *Fisheries Case,*[12]: "The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the legislature is elected."

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[9] As to which, see *supra* pp. 30-50.

[10] (1874) L. R. 6 P. C. 31. See, also, *supra* pp. 120-122.

[11] [1899] A. C. 580, at p. 585. And see *supra* pp. 75, 82-85.

Provincial legislation not invalid by reason of possibility of Dominion legislation superseding it.—Nor is a provincial legislature incapacitated from enacting a law otherwise within its proper competency merely because the Dominion parliament might under section 91 of the British North America Act, if it saw fit so to do, pass a general law which would embrace within its scope the subject matter of the provincial

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[12] [1898] A. C. at p. 713.

Act. This is affirmed and illustrated by the Judicial Committee of the Privy Council in *L'Union St. Jacques de Montreal* v. *Belisle,*[13] where they held that a certain Act of the legislature of Quebec, passed for the relief of a benefit and benevolent Society in Montreal, was within the legislative capacity of that legislature. As the judgment points out, the Act dealt solely with the affairs of that particular Society, and in this manner: taking notice of a certain state of embarrassment resulting from what is described, in substance, as improvident regulations of the Society, it imposed a forced commutation of their existing rights upon two widows, who, at the time when the Act was passed, were annuitants of the Society under its rules, reserving to them the rights so cut down in the future possible event of the improvement up to a certain point of the affairs of the Association. Their lordships held that clearly this matter was private and local, relating, as it did, to a benevolent or benefit Society incorporated in the City of Montreal within the province, which appeared to consist exclusively of members who would be subject *prima facie* to the control of the provincial legislature. They, however, allude[14] to the hypothesis stated in argument by Mr. Benjamin, of a law having been previously passed by the Dominion parliament to the effect that any Association of that particular kind throughout the Dominion, on certain specified conditions, assumed to be exactly those which appeared upon the face of the statute in question, should, thereupon, *ipso facto,* fall under the legal administration in bankruptcy or insolvency; and say that they are " by no means prepared to say that if any such law as that had been passed by the Dominion legislature it would have been within the competency of the provincial legislature afterwards to take a particular Association out of the scope of a general law of that kind, so competently passed by the authority which had power to deal with bankruptcy and insolvency. " But," they add, " no such law ever has been passed; and to suggest the possibility of such a law as a reason why the power of the provincial legislature over this, a local and private Association, should be in abeyance or altogether taken away, is to make a suggestion, which, if followed up to its consequences, would go far to destroy that power in all cases." They point out that, upon the same principle, because under No. 7 of section 91 of the British North America Act, the Dominion parliament has the exclusive right of legislating as to all matters coming under the head of 'militia, military and naval service, and defence,' and because any part of the land in the province of Quebec might be taken by the Dominion legislature for the purpose of military defence, and because that which had not been done as to some particular land, might possibly have been done, therefore, it not having been done, all power over that land, and, therefore, over all the land in the province of Quebec is taken away, so far as it relates to legislation concerning matters of a purely local or private nature, which, they say, they think neither a necessary or reasonable, nor a just or proper construction.

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[13] (1874) L. R. 6 P. C. 31.

[14] At pp. 36-37.

The late Lord Watson put the point with his usual clearness, when he said, in the course of the argument in the *Liquor Prohibition Appeal, 1895*,[15] that one of the oldest principles of the law governing the exercise of legislative power in Canada to be found is this that "there are matters with which the province can deal which are not excepted from their legislative jurisdiction until the Dominion Government has proceeded to act upon the powers given to it by certain sub-sections of section 91." And in this connection the words of the Minister of Justice in his report of December 28th, 1901, on a Prince Edward Island Act[16] may be noted: "There may be provincial legislation which can have effect until superseded by Parliament, and as to such the undersigned apprehends, that the power of disallowance may be properly exercised if the legislation be, in the opinion of your Excellency's Government, prejudicial to Dominion interests."

On the other hand, in *Union Colliery Co.* v. *Bryden*,[17] their lordships have said that the abstinence of the Dominion parliament from legislating to the full limit of its powers cannot have the effect of transferring to any provincial legislature the legislative power assigned to the Dominion by section 91 of the British North America Act.

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[15] Printed report published by Wm. Brown & Co., London, 1895, at p. 245.

[16] Provincial Legislation, 1901-1903, p. 97.

[17] [1899] A. C. 580, at p. 588.

Property and civil rights in the province.—We shall have to consider more particularly the precise scope of the power over property and civil rights within their respective territories given to the provincial legislatures by No. 13 of section 92 of the British North America Act when we come to treat particularly of the various enumerated powers bestowed in that section, and in section 91,[17a] but the words of Fournier, J., in *Citizens Insurance Co.* v. *Parsons,*[18] seem indisputable, and apposite to the subject now under discussion, that the aim of the law-giver in dividing the legislative powers by section 91 and 92 of the British North America Act between the Federal Government and the provinces was, so far as compatible with the new order of things, to conserve to the latter their autonomy so far as the civil rights peculiar to each of them were concerned. To put the matter even more generally, we may say in the words of Mr. Benjamin on the argument before the Privy Council in *Russell* v. *The Queen*:[19] "Whatever was domestic, whatever was private, whatever was home rule was to be left with the provinces. Their domestic institutions, their home rule, was not to be interfered with."

Provincial executive authority. — So, also, the words of Ritchie, C.J., in *Mercer* v. *Attorney-General of the Province of Ontario,*[20] may be cited here, that—" As to matters coming within the classes of subjects enumerated in section 91 of the British North America Act, over which the exclusive legislative authority of the Parliament of Canada is declared to extend, there is not to be found one word expressing or implying the right to interfere with provincial executive authority;" although the recent decision of the Privy Council in *Attorney-General of British Columbia* v. *Canadian Pacific R. W. Co.*,[21] shews that he is mistaken when he adds—" or property and its incidents."

[17a] See *infra* pp. 488-521.

[18] (1880) 4 S. C. R. at p. 255.

[19] Transcript from shorthand notes of Marten & Meredith. Other *dicta* of the same kind will be found in Legislative Power in Canada, pp. 702-704.

[20] (1881) 5 S. C. R. at p. 638.

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[21] [1906] A. C. 204. See, as to this case, *infra* p. 343.

CHAPTER XX.

ASPECTS OF LEGISLATION.

One of the most interesting and important principles which have been evolved by judicial decision in connection with the distribution of legislative power in Canada is that expressed by the Judicial Committee where they say in *Hodge* v. *The Queen,*[1] "the principle which the case of *Russell* v. *The Queen,*[2] and the case of *Citizens Insurance Co.*[3] illustrate, is that subjects which in one aspect and for one purpose fall within section 92 of the British North America Act, may in another aspect and for another purpose, fall within section 91;" a principle, it may be added, which is well illustrated in reference to legislation relating to fisheries by their lordships in the *Fisheries* case,[4] and again by a passage in their judgment in *Union Colliery Co. of British Columbia* v. *Bryden.*[5] Upon the argument in the last named case, Mr. Haldane observes: "It is remarkable the way this Board has reconciled the provisions of section 91 and section 92, by recognizing that the subjects which fall within section 91 in one aspect, may, under another aspect, fall under section 92.[6]

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[1] (1883) 9 App. Cas. at p. 130.

[2] (1882) 7 App. Cas. 829.

[3] (1881) 7 App. Cas. 96.

[4] *Atty.-General of the Dominion* v. *Atty.-General of the Provinces,* [1898] A. C. 700, at p. 716. *Infra* pp. 247, 262-3.

[5] [1899] A. C. 580, at p. 587. See *infra* pp. 305-7.

[6] Transcript from shorthand notes by Marten, Merdith & Henderson.

We shall find when we proceed to consider how these and other cases illustrate the principle thus expressed, that by 'aspect' must be understood the aspect or point of view of the legislator in legislating—the object, purpose, and scope of the legislation: that the word is used subjectively of the legislator, rather than objectively of the matter legislated upon.

Liquor legislation.—Thus in *Russell* v. *The Queen*,[7] when it was contended that the Canada Temperance Act, 1878, was *ultra vires* of the Dominion parliament, because it had relation to property and civil rights, which by No. 13 of section 92 of the British North America Act was assigned to the provincial legislatures, their lordships say: "What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and, though incidentally the free use of things in which men have property is interfered with, that incidental interference does not alter the character of the law. Upon the same considerations the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property, to be criminal and wrongful. Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers the public safety, or to overwork his horse on the ground of cruelty to the animal, though affecting in some sense property and the right of a man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property and civil rights. Nor could a law which prohibited or restricted the sale or exposure of cattle having a contagious disease be so regarded.[8] Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law.'' And what in *Hodge* v. *The Queen,*[9] their lordships are pointing out in the passage above referred to, is that it was a mistake to suppose that because, in *Russell* v. *The Queen*,[10] they had held that the Canada Temperance Act, 1878, which abolished all retail transactions between traders in liquor and their customers within every provincial area in which its enactments had been adopted by the majority of the local electors as in the Act provided, and which, viewed in its proper aspect, and with reference to its proper purpose, was a general Act relating to public order and safety and good morals in the Dominion, fell within the powers conferred upon the Dominion parliament by section 91 of the British North America Act, to make laws for the peace, order, and good government of Canada, therefore it followed that the whole subject of the liquor traffic was given to the Dominion parliament, and, consequently, taken away from the provincial legislatures, and that the Liquor License Act of Ontario, R. S. O. 1877, c. 181, which was confined in its operation to municipalities in Ontario, and entirely local in its character and operation, was necessarily *ultra vires.* On the contrary, their lordships held, in *Hodge* v. *The Queen,* that the portions of the said Ontario License Act with which they had to deal came within Nos. 8, 15, and 16 of section 92,[11] and not within section 91. Thus in words of Meredith, C.J., in *Blouin* v. *The Corporation of the City of Quebec,*[12] those people are mistaken who " seem to think it impossible that Parliament and the provincial legislatures can for any purpose whatever, or under any circumstances whatever, legislate in relation to the same matter."

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[7] (1882) 7 App. Cas. at pp. 838-9.

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[8] And so in *Brooks* v. *Moore* (1907), 13 B. C. 91, Morrison, J., held the Animal Contagious Diseases Act, 1903, to be *intra vires* of the Dominion parliament, citing this passage. He held, further, that it came under sec. 95 of the British North America Act as relating to federal agriculture. See, as to this section, *infra* pp. 667-671.

[9] (1883) 9 App. Cas. at p. 130.

[10] (1882) 7 App. Cas. 829.

Prohibition legislation.—The cases, then, of *Russell* v. *The Queen* and *Hodge* v. *The Queen* illustrate the fact that there may be legislation in respect to traffic in liquors in two different aspects, one contemplating its prohibition in the general interests of the Dominion, and the other contemplating its regulation in the interests of the good order of the municipalities. But as to the prohibition of trade in intoxicating liquors, the recent decision of the Privy Council on the *Liquor Prohibition Appeal, 1895,*[13] shows that it also itself may be treated from two different aspects, under one of which it is within the exclusive jurisdiction of the Dominion parliament, while under the other it is within the exclusive jurisdiction of the provincial legislatures. Their lordships hold that: "A law which prohibits retail transactions and restricts the consumption of liquor within the ambit of the province, and does not affect transactions in liquor between persons in the province and persons in other provinces or in foreign countries, concerns property in the province which could be the subject matter of the transactions if they were not prohibited, and, also, the civil rights of persons in the province," and may, perhaps, be authorized under No. 13 of section 92, 'property and civil rights in the province;' but they do not consider it necessary to determine whether such legislation is authorized under that head or not, because, if not, it is certainly "not impossible that the vice of intemperance may prevail in particular localities within the province, to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor, a matter of a merely local or private nature, and, therefore, falling *prima facie* within No. 16 " (sub-section of section 92 of the British North America Act).[14] " In that state of things," they add, " it is conceded that the parliament of Canada could not imperatively enact a prohibitory law adopted and confined to the requirements of localities within the province, where prohibition was urgently needed." But none the less, as decided in *Russell* v. *The Queen,* the Dominion parliament has power to legislate for the suppression of the liquor traffic in a Canadian aspect for the peace, order, and good government of Canada generally.

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[11] That is, they came within the three conjointly. See per Lord Herschell in the argument on *The Liquor Prohibition Appeal,* 1895, at p. 156. (Published by Wm. Brown & Co., London, 1895).

[12] (1880) 7 Q. L. R. at p. 22.

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[13] [1896] A. C. 348. Wheeler, Confederation Law, pp. 1042 *seq.*, gives a *verbatim* account of the proceedings before the Privy Council.

In *Attorney-General of Manitoba* v. *Manitoba License Holders Association,*[15] the Judicial Committee, referring to the Liquor Prohibition

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[14] As to a similar provincial power to prohibit the manufacture of intoxicating liquors,—" if it were shown that the manufacture was carried on under such circumstances and conditions as to make its prohibition a merely local matter in the province," —see S. C. at p. 371. As in the *Brewers and Maltsters Association of Ontario* v. *Attorney-General for Ontario,* [1897] A. C. 231, where the main object of the Act before them was to raise a revenue for provincial purposes, so in the matter of the Dominion Liquor License Acts, 1883-4, Cass. Dig. S. C. 509, where the object of the legislation was rather regulation of the liquor traffic, the Privy Council finds nothing turns, so far as legislative power is concerned, upon the fact that those affected by the statutory provisions dealt in wholesale quantities, and not in retail quantities. And in the recent *Liquor Prohibition Appeal,* 1895, [1896] A. C. 348, they, in like manner, draw no distinction whatever between the sellers of liquors in wholesale quantities, and other sellers; and say of the Canada Temperance Act, 1886:—" They draw an arbitrary line at eight gallons in the case of beer, and at ten gallons in the case of other intoxicating liquors, with the view of discriminating between wholesale and retail transactions." See further on this subject of the distinction between wholesale and retail trading, Law of Legislative Power in Canada, pp. 726-730; and *infra* p. 438, n.

[15] [1902] A. C. at p. 78.

Appeal, 1895, and to their statement there that it was not necessary for the purpose of that appeal to determine whether such legislation was authorized by No. 13 or by No. 16 of section 92, add: " Although this particular question was thus left apparently undecided, a careful perusal of the judgment leads to the conclusion that, in the opinion of the Board, the case fell under No. 16 rather than under No. 13. And that seems to their lordships to be the better opinion. In legislating for the suppression of the liquor traffic the object in view is the abatement or prevention of a local evil, rather than the regulation of property and civil rights—though, of course, no such legislation can be carried into effect without interfering more or less with ' property and civil rights in the province.' Indeed, if the case is to be regarded as dealing with matters within the class of subjects enumerated in No. 13 it might be questionable whether the Dominion legislature could have authority to interfere with the exclusive jurisdiction of the province in the matter."

In other words, as their lordships say in this very case (p. 77): " The drink question, to use a common expression which is convenient if not altogether accurate, is not to be found specifically mentioned either in the classes of subjects enumerated in section 91, and assigned to the legislature of the Dominion, or in those enumerated in section 92, and thereby appropriated to provincial legislatures;" therefore, there may be legislation on the drink question in a Dominion aspect, or in a provincial aspect. But ' property and civil rights in the province' are among the specially enumerated classes in section 92, and, therefore, the Dominion parliament could not legislate in relation to 'property and civil rights' in all the provinces, or in more than one province (using legislation in relation to property and civil rights in the proper sense of section 92) and defend that legislation as legislation on the subject in a Dominion aspect.[16]

Liquor traffic regulation.—And it would seem in no way doubtful that the regulation of the liquor traffic also admits of two aspects in which it may be viewed and legislated upon. That it may be legislated upon in the provincial aspect, notwithstanding that by No. 2 of section 91 the regulation of trade of commerce is committed exclusively to the Dominion parliament, is, of course, established by the case of *Hodge* v. *The Queen,* already sufficiently referred to; and the decision of the Privy Council in the matter of the Dominion License Acts 1883-4, although no reasons were there given, evidently proceeded upon the ground that Parliament was therein legislating upon the subject not in a Dominion aspect, but in a provincial aspect, and that the Acts were, therefore, *ultra vires.* A perusal of Marten and Meredith's shorthand notes of the argument which are in print, leads to the conclusion that in their decision the Board accepted the contention of Mr. Davey that the Acts were *ultra vires* because they were for the purpose of regulating the liquor traffic through the machinery of local municipal licensing bodies, exercising restricted local jurisdiction, and exercising police functions within those local jurisdictions, and amounted also to a taxation of the inhabitants within the respective provinces for municipal purposes, because the balance of the license fund under them, after payment of the inspectors' salaries and the expenses of the commissioners, was to go into the municipal treasury, the regulation and the legislation with reference to wholesale licenses being the same as that with reference to shop licenses.

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[16] And see now in connection with this case of *Attorney-General of Manitoba* v. *The Manitoba License Holders' Association,* [1902] A. C. 73: *City of Montreal* v. *Beauvais* (1909), 42 S. C. R. 211; *Ex parte O'Neill* (1905), R. J. O. 28 S. C. 304. As to the power of the Ontario legislature to prohibit the sale of liquor on vessels on the great lakes, see *Rex* v. *Meikleham* (1905), 11 O. L. R. 366. And as to a provincial legislature having power to provide in a Prohibition Act that liquor seized under the Act shall be confiscated, see *Matthews* v. *Jenkins* (1907), 3 E. L. R. 577 (P.E.I.) It is no objection to a local option by-law, resting upon provincial legislation, that it includes a public harbour, for although the harbour may be, as a harbour, within the jurisdiction of the parliament of Canada, it is none the less, for purposes within the ambit of provincial legislation, within the jurisdiction of the province and its legislatures, provincial and municipal: *Re Sturmer and Town of Beaverton* (1911), 24 O. L. R. 65, 72.

It may further be observed that under the Dominion License Acts, 1883-4, each Board of license commissioners of the different districts might make their own regulations. On the other hand, in *Russell* v. *The Queen,*[17] the Privy Council especially insist upon the element of uniformity in the Canada Temperance Act when holding it *intra vires,* saying: "The objects and scope of the legislation are general, viz., to promote temperance by means of a uniform law throughout the Dominion. The manner of bringing the prohibition and penalties of the Act into force, which Parliament has thought fit to adopt, does not alter its general and uniform character. Parliament deals with the subject as one of general concern to the Dominion, upon which uniformity of legislation is desirable, and Parliament alone can so deal with it."

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[17] (1882) 7 App. Cas. at p. 841.

In their judgment, moreover, in the *Liquor Prohibition Appeal, 1895*,[18] the Privy Council call attention to the fact that matters which, at one time, may only admit of being treated in a local or provincial aspect may, at another time, assume a phase in which they may admit, also, of being treated in a Dominion or national aspect. They say at the place referred to: "Their lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian parliament in passing laws for their regulation or abolition, in the interests of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and, therefore, within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become a matter of national concern in such sense as to bring it within the jurisdiction of the parliament of Canada. An Act restricting the right to carry weapons of offence, or their sale to young persons, within the province, would be within the authority of the provincial legislature.

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[18] [1896] A. C. 348.

But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign State, are matters which their lordships conceive might be competently dealt with by the parliament of the Dominion."

The decisions, therefore, which have arisen in connection with laws prohibiting or regulating the liquor traffic illustrate in a remarkable way the fact, that under our Constitution,⟨subjects which, in one aspect and for one purpose, fall within the jurisdiction of the provincial legislature, may in another aspect and for another purpose, fall within the jurisdiction of the Dominion parliament.⟩ The Privy Council in *Hodge* v. *The Queen*,[19] as we have seen,[20] referred to the case of *Citizens Insurance Co.* v. *Parsons*,[21] as illustrating the same principle. What they, doubtless, mean is that the purport of their judgment in that case was that the true aspect of the Ontario Insurance Act which they there held *intra vires* was that of an Act intended to regulate the business of fire insurance companies in the province of Ontario, with a view to securing uniform conditions in their policies, and not that of an Act for the general regulation of trade in the Dominion; and that for this reason it fell within No. 13 of section 92 of the British North America Act, 'property and civil rights in the province,' and not within No. 2 of section 91, 'the regulation of trade and commerce.'[22]

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[19] (1883) 9 App. Cas. at p. 130.

[20] *Supra*, p. 199.

[21] (1881) 7 App. Cas. 96.

[22] For other illustrations of this principle in the provincial Courts, see Law of Legislative Power in Canada, pp. 411-415, in

CHAPTER XXI.

THE OBJECT AND SCOPE OF LEGISLATION AND OTHER CONSIDERATIONS RELEVANT TO CONSTITUTIONALITY OF STATUTES.

It follows as a necessary corollary of the principle discussed in the last chapter that, as the Privy Council says in *Russell* v. *The Queen*,[1]: " The true nature and character of the legislation in the particular instance under discussion—its grounds and design, and the primary matter dealt with—its object and scope, must always be determined in order to ascertain the class of subject to which it really belongs, and any merely incidental effect it may have over other matters does not alter the character of the law." We saw, in the last chapter, how this was illustrated in *Russell* v. *The Queen*. It may be added that later on, in the same judgment, their lordships held that though the

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connection especially with municipal police regulation as contrasted with criminal law; and as to the expression 'police regulation,' see *infra* p. 584, n. For a late case, see *City of Montreal* v. *Beauvais* (1909), 42 S. C. R. 211; and *cf. Attorney-General of Ontario* v. *Hamilton Street R. W. Co.*, [1903] A. C. 524; and *Kerley* v. *London & Lake Erie* (1912), 26 O. L. R. 588. So Pomeroy on Constitutional Law, 1st ed., at p. 218, cited by Fournier, J., in *Citizens Insurance Co.* v. *Parsons* (1880), 4 S. C. R. at p. 260, says: 'All experience shows that the same measures or measure scarcely distinguishable from each other may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.'

[1] (1882) 7 App. Cas. at pp. 838-40.

Canada Temperance Act, 1878, which was the Act in question, was to be brought into force in those localities only which adopted it by local option exercised in the prescribed manner, it was, nevertheless, not to be considered as relating to matters of a merely local or private nature within the province, within the meaning of No. 16 of section 92 of the British North America Act, and say: " The objects and scope of the legislation are still general, namely, to promote temperance by means of a uniform law throughout the Dominion."

And the previous decision of the Board in *Attorney-General of Quebec* v. *Queen Insurance Company,*[2] also affords an excellent example of the principle under discussion. There it appeared that the provincial Act of Quebec, 39 Vict. ch. 7, purported to be, on the face of it, an exercise of the powers conferred by No. 9 of section 92, as to ' shop, saloon, tavern, auctioneer, and other licenses,' and to impose a license on persons carrying on the business of assurance in the province, but, as a matter of fact, did not compel the supposed licensee to take out or pay for a license, but merely provided that ' the price of such license ' should consist of an adhesive stamp to be paid in respect to each transaction, not by the licensee, but by the person who dealt with him. Their lordships held that the Act was virtually a Stamp Act, and not a License Act, and they further held that it was not direct taxation, and was *ultra vires*. They say: " The result is this, that it is not in substance a License Act at all; it is nothing more nor less than a simple Stamp Act on the policies, with provisions referring to a license, because, it must be presumed, the framers of the Statute thought it was necessary, in order to cover the kind of tax in question with legal sanction, that it should be made in the shape of the price paid for a license."

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[2] (1878) 3 App. Cas. 1090.

And in the argument on the Liquor Prohibition Appeal, 1895, Lord Watson says,[3]: "We are always inclined to stand on what is the main substance of the Act in determining under which of these provisions it really falls. That must be determined *secundum subjectam materiam,* according to the purpose of the statute, as that can be collected from its leading enactments. When a legislature proceeds to enact that not less than a certain quantity of liquor shall ever be sold retail, what is the object of it? Is it for the physical benefit of the population that they are legislating? Is it because small quantities should not in their opinion be sold to any one who wants a drink? Or is it because they want to regulate the trade?" Again, later on,[4] he says: "There may be a great many objects, one behind the other. The first object may be to prohibit the sale of liquor, and prohibition the only object accomplished by the Act. The second object probably is to diminish drunkenness; the third object to improve morality, and good behaviour of the citizens; the fourth object to diminish crime, and so on. These are all objects. Which is the object of the Act? I should be inclined to take the view that that which it accomplished, and that which is its main object to accomplish, is the object of the statute; the others are mere motives to induce the legislature to take means for the attainment of it." And we may add in this connection the observation of Gray, J., in *Tai Sing* v. *Maguire*,[5] that "the preamble is really no substantial part of an Act. It is simply the professed light by which it is alleged the Act should be read; but in determining the objects of the Act we must look, not at the preamble, but really at its enacting clauses."[6]

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[3] Published by Wm. Brown & Co., London, 1895: p. 184.

[4] At pp. 317-8.

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It must, however, be remembered that when once it is clear to what class any particular Act belongs, and, therefore, whether it is within the jurisdiction of Parliament, or within that of the provincial legislature, the motive which induced Parliament, or a local legislature, to exercise its power in framing it cannot affect its validity. This has already been pointed out in a previous chapter.[6a]

Presumption in favour of the validity of Acts.—We may refer here to the presumption in favour of the validity of statutes. That it is not to be presumed that the Dominion parliament has exceeded its powers, unless upon grounds really of a serious character, is laid down by the Privy Council in *Valin* v. *Lang-*

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[5] (1878) 1 B. C. Irving 101, at p. 104.

[6] For other Canadian decisions illustrating the text generally, see Law of Legislative Power in Canada, pp. 419-424.

[6a] *Supra*, p. 75.

lois,[7]; and their lordships have, also, said in *L'Union St. Jacques de Montreal* v. *Belisle,*[8] that where the validity of a provincial Act is in question, and it clearly appears to fall within one of the classes of subjects enumerated in section 92 of the British North America Act, the onus is on the persons attacking its validity to shew that it does also come within one or more of the classes of subjects specially enumerated in section 91. But the Canadian Courts have gone further, and laid it down that in respect to provincial statutes, generally, every possible presumption must be made in favour of their validity, even to the extent of disregarding title, and preamble, and the legislature's own interpretation of the meaning of an Act passed by itself, and its own statement of the particular power under which it is legislating. As Ramsay, J., puts it in *Hamilton Powder Co.* v. *Lambe,*[9]: "The powers of a local legislature are gathered from the subject matter, and not from the declaration of their powers." Were it not for these decisions, however, the propriety of any general presumption in favour of provincial Acts might be doubted, inasmuch as the provinces have only specially enumerated powers of legislation, and what is not given to them, is given to the Dominion parliament. And so, in *Dallaire* v. *La Cité de Quebec,*[10] Langelier,

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[7] (1879) 5 App. Cas. at p. 118.

[8] (1874) L. R. 6 P. C. 31.

[9] (1885) M. L. R. 1 Q. B. 460, at p. 466. For other Canadian dicta and decisions relating to this matter, see Law of Legislative Power in Canada, pp. 261-269.

[10] (1907) R. J. Q. 32 S. C. at p. 120.

A.J.C., claims that the presumption in case of doubt as to whether a province or the Dominion has power to pass certain legislation, ought to be in favour of the Dominion, rather than of the province, on the ground that our Constitution reserves to the parliament of Canada all those powers which are not expressly given to the local legislatures. And certainly the weighty words of Henry, J., in *City of Fredericton* v. *The Queen,*[11] may well be borne in mind: "It has been properly said, that it is a serious matter to consider and decide that an Act of a legislature is *ultra vires*; but it is much more serious and unfortunate, by any judicial decision, to destroy the Constitution of a country. The importance of our decision arises, not nearly so much from any effect it may have on the Act in question, which, in itself, claims from us the most patient and deliberate consideration, but from the general result, in view of the constitutional relations established by the Imperial Act in question, as provided in the sections referred to in regard to other subjects."

Interpretation put on the Federation Act by Dominion parliament or Imperial officials. — Declarations of the Dominion parliament are not, of course, conclusive upon the interpretation of the British North America Act; but when the proper construction of the language used in that Act to define the distribution of legislative power is doubtful, the interpretation put upon it by the Dominion parliament, in its actual legislation, may properly be considered. The Privy Council lay this down in *Citizens Insurance Co.* v. *Parsons,*[12] where they refer in a marked way to certain Acts of the Dominion parliament in which the power of the provinces to incorporate insurance companies for carrying on business within the provinces is explicitly recognized, pointing out that such recognition is directly opposed to the contention raised by counsel in that case, that by No. 11 of section 92 of the British North America Act, the 'incorporation of companies with provincial objects,' is meant companies with public provincial objects, so as to exclude insurance and commercial companies. And, no doubt, this applies, *a fortiori,* when the provincial legislatures have, by their legislation, shown agreement in the views of the Dominion parliament as to their respective powers. And so in the same case in the Supreme Court,[13] Fournier, J., says: "We may fairly presume that the agreement of both legislatures to keep within the limit of their respective powers affords a strong presumption that they have only exercised such powers as properly belonged to them." So, too, the views acted upon by the great public departments, as expressed in Imperial despatches, or otherwise, carry weight in the absence of judicial decision.[14]

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[11] (1880) 3 S. C. R. at p. 545.

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[12] (1881) 3 App. Cas. at p. 116. *Cf. Canadian Pacific R. W. Co.* v. *James Bay R. W. Co.* (1905), 36 S. C. R. 42, per Nesbitt, J., at pp. 89-90.

[13] 4 S. C. R. at pp. 279-280. See further, Legislative Power in Canada, pp. 237-238.

[14] Per Taschercau, J., in *Mercer* v. *Attorney-General for Ontario* (1881), 5 S. C. R. at p. 673.

But, as already indicated (*supra* pp. 69-75), the Federal parliament cannot, either expressly or impliedly, take away from, or give to the provincial legislatures a power which the Imperial Act does, or does not, give them, and the same is, *mutatis mutandis,* the case with the provincial legislature; and, therefore, although a certain weight must be attached to the views of their respective powers expressed by the Dominion parliament and the provincial legislatures, through the medium of their legislative enactments, the futility of any of these bodies assuming to declare authoritatively the proper interpretation of the British North America Act cannot be disputed.[15]

Continued exercise of a legislative power does not make it constitutional.—So again, in the words of Ritchie, C.J., in *Valin* v. *Langlois,*[16] it is clear that if the Dominion parliament does not possess a legislative power, neither the exercise, nor the continued exercise, of a power not belonging to it can confer it, or make its legislation binding. And the same is, of course, true of legislation by provincial legislatures. A strong protest against basing a claim to legislative power upon the fact of continued exercise of such power by the Dominion or the provinces, and the acquiescence therein of the one or the other, is contained in the report of Sir

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[15] And so per Gwynne, J., in *Lenoir* v. *Ritchie* (1879), 3 S. C. R. at pp. 639-640; per Taschereau, J., in *Valin* v. *Langlois* (1879), 3 S. C. R. at pp. 73-74. As to legislation by reference see *supra*, pp. 71-3.

[16] 3 S. C. R. at p. 26.

John Thompson, as Minister of Justice, upon the Acts of the Province of New Brunswick for 1889.[17] He says there that he deems it his duty to express his dissent from the view " that the interpretation of the British North America Act can in any way be affected by subsequent legislation by Parliament, or the legislatures, or by any action of the Government. No legislative body can, by legislation, increase or diminish the authority conferred upon it by the Constitution, nor can any expression of opinion or course of legislative action by either afford any conclusive or even satisfactory guide to its interpretation.[18] . . No person in Canada can be bound by acquiescence in unconstitutional legislation on the part of Governments, even if such acquiescence has occurred."

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[17] Provincial legislation, 1867-1895, at p. 753.

[18] As to whether, nevertheless, the Dominion parliament may not have certain powers of amending even the British North America Act, apart from any interference with the provincial powers, under its residuary power of legislation, see *supra*, pp. 100-1.

CHAPTER XXII.

STATUTES UNCONSTITUTIONAL IN PART ONLY.

1. We have seen in speaking of the Crown that a provincial Act, if disallowed by the Governor-General in Council, must be disallowed altogether, that this or that clause of an Act cannot be vetoed without the remainder (*supra* p. 82). A different principle prevails when the question of the constitutional validity of statutes comes before the Courts. Although part of an Act, either of the Dominion parliament or of a provincial legislature, may be *ultra vires,* and therefore invalid, this will not invalidate the rest of the Act, if it appears that the one part is separate in its operation from the other part, so that each is a separate declaration of the legislative will, and unless the object of the Act is such that it cannot be attained by a partial execution. The judgment, or rather the report, of the Judicial Committee of the Privy Council upon the Dominion Liquor License Acts, 1883-4, supports and illustrates this. They say that the Acts "are not within the legislative authority of the parliament of Canada. The provisions relating to adulteration, if separated in their operation from the rest of the Acts, would be within the authority of the parliament; but as in their lordships' opinion they cannot be so separated, their lordships are not prepared to report to Her Majesty that any of these Acts is within such authority." And so in *Corporation*

of Three Rivers v. *Sulte,*[1] Ramsay, J., says: " A statute *ultra vires* does not remain in force for a part, because some fractional part is within the powers of the legislature, unless it appears that the subject beyond the powers of the legislature is perfectly distinct from that within, and that each is a separate declaration of the legislative will. This is not the case here." Thus the fact that a provincial Act authorizes something to be done which the legislature had power to authorize, does not necessarily make the Act *intra vires* even in respect to such application of it. But, on the other hand, an Act may, certainly, sometimes be *intra vires* in some of its applications, while *ultra vires* in others.[2]

It is clear that we cannot always treat particular sections of an Act as isolated independent clauses. The Act may form one connected scheme to attain one definite object, and so may have to be dealt with as a whole, when its constitutionality is impugned. And so, in another judgment, Ramsay, J., says,[3]: " To let a law stand which is partly *ultra vires* and partly constitutional, may be the most perfect mode of defeating the legislative will. I, therefore, say that a law which is *ultra vires* in part may thereby be *ultra vires* in whole, and so it should be construed, at all events, when it appears that the object of the Act is not attained by a partial execution. Take, for instance, an Act of incorporation of a railway company from

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[1] (1882) 5 L. N. at p. 332.

[2] See Legislative Power in Canada, pp. 293-299.

[3] *Dobie* v. *The Temporalities Board* (1880), 3 L. N. at p. 251.

Quebec to Toronto. Could that be interpreted as an Act of incorporation from Quebec to the province line? Unquestionably it could not be."

This matter is referred to in the Australian case of *The King* v. *Commonwealth Court of Conciliation.*[4] At pp. 315-320, the test is said to be whether the statute with the invalid portions omitted would be substantially a different law as to the subject-matter dealt with by what remained, from what it would be with the omitted portions forming part of it."[5]

2. Company powers under incorporating Acts.—But it must not be supposed that Acts incorporating companies must necessarily be invalidated altogether because *ultra vires* in part. In *Colonial Building and Investment Association* v. *The Attorney-General of Quebec,*[6] Dorion, C.J., with whom Cross and Baby, JJ., concurred, says: "Without deciding that the whole Act incorporating the company respondent is *ultra vires,* we hold that the company has no right to exercise in the province of Quebec the powers conferred by its Acts of incorporation, to buy, lease and sell land, etc., in the province of Quebec." So, again, Dorion, C.J., says,[7] of the Dominion Act incorporating the Bell Telephone Co. with power to build and operate telephone lines in Canada or elsewhere: " It is not necessary to decide whether or not the whole Act of incorporation is *ultra vires,* it is sufficient for this case that the authority given to erect telegraph poles in the streets of the City of Quebec is *ultra vires."*

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[4] (1910), 11 C. L. R. 1, at p. 22.

[5] See, also, an Article on Unconstitutional Legislation by W. Harrison Moore (1908-9), 6 Commonwealth Law Rev. 201.

[6] (1882), 27 L. C. J. at p. 304. The Privy Council, on appeal to it, however, held the Act *intra vires* in all respects: (1883) 9 App. Cas. 157.

[7] *Regina* v. *Mohr* (1881), 7 Q. L. R. at p. 190. Here, again, the Privy Council have overruled the actual decision, holding the whole Act *intra vires,* [1905] A. C. 52.

3. Nullity of unconstitutional Acts. — It is scarcely necessary to say that a transaction which is *ultra vires* of the parties to it can derive no support from an Act which is itself *ultra vires* of the legislature passing it; nor will the right of those affected by it, to treat it as of no legal force or validity, be interfered with by such an Act. So, likewise, incapacities imposed upon persons guilty of certain practices by an Act which is *ultra vires* will not enure against or affect those persons. If authority is wanted for such manifest propositions it can be found in the decisions of the Privy Council in *Bourgoin* v. *La Compagnie du Chemin de Fer de Montreal,*[8] and in *Théberge* v. *Landry.*[9] And similarly under the American Constitution, Judge Cooley,[10] says: ' When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for a consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an Act void *in toto* is true, also, as to any part of an Act which is found to be unconstitutional, and which consequently is to be regarded as having never, at any time, been possessed of legal force.[11]

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[8] (1880), 5 App. Cas. 381, at p. 406.

[9] (1876), 2 App. Cas. 102.

[10] Constitutional limitations, 6th ed., at p. 222.

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[11] As to whether it is necessary to specially plead the unconstitutionality of a statute, and whether one can be estopped from so doing, see *infra* p. 644, n. See, also, per Meredith, C.J., in *Valin* v. *Langlois* (1879), 5 Q. L. R. at p. 16; per Duval, C.J., in *L'Union St. Jacques de Montreal* v. *Belisle* (1872), 20 L. C. J. at p. 39; *L'Association Pharmaceutique* v. *Livernois* (1900), 30 S. C. R. 400.

CHAPTER XXIII.

LEGISLATIVE POWER AND PROPRIETARY RIGHTS.

The subject of Dominion and provincial property under the British North America Act will be discussed in a later chapter, but it is proper to call attention here to the distinction between a gift by that Act of legislative power, and a gift by it of proprietary rights. The fact that legislative jurisdiction in respect of a particular subject-matter is conferred on the Dominion parliament or provincial legislatures affords no evidence or presumption that any proprietary rights with respect to it were transferred by the Act to the Dominion or provinces respectively. Thus, in the *Fisheries Case,*[1] the Privy Council say: " It must be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion parliament proprietary rights were transferred to it. The

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[1] *Attorney-General for the Dominion* v. *Attorney-General for the Provinces*, [1898] A. C. 700, at pp. 709-711. As to this case see, also, *The King* v. *Ship North* (1906), 37 S. C. R. 385, 11 Ex. C. R. 141, where *held* that the Dominion Government has power to absolutely prohibit foreign nations from fishing within the three-mile limit of the coast of Canada.

Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were, at the time of the passing of that Act possessed by the provinces, remain vested in them, except such as are by any of its express enactments transferred to the Dominion of Canada.[2] In like manner in *St. Catharines Milling and Lumber Co.* v. *The Queen,*[3] their lordships had said—" There can be no *a priori* probability that the British legislature in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the parliament of the Dominion is not in the least degree inconsistent with the right of the provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title."

So, again, the Dominion parliament has no power, by virtue of its legislative jurisdiction under section 91 of the British North America Act to confer upon others proprietary rights where it possesses none itself, unless under such items of section 91 as necessarily imply the power to deal with property although not vested in the Crown as represented by the Dominion Government. Thus, in the *Fisheries* case just referred to, the Privy Council say: "If the legislature purports to confer upon others proprietary rights where it possesses none itself, that, in their lordships' opinion, is not an exercise of the legislative jurisdiction conferred by section 91. If the contrary were held it would follow that the Dominion might practically transfer to itself property which had, by the British North America Act, been left to the provinces and not vested in it." But these words have, of course, to be understood in the light of the subject-matter then before the Board. The question was whether under their legislative jurisdiction under item 12 of section 91 over 'Sea Coast and Inland Fisheries,' the Dominion parliament had jurisdiction to authorize the giving by lease, license, or otherwise, to lessees, licensees, or other grantees, the right of fishing in fisheries vested in private individuals or in the provinces. Their lordships held that it had not, for that the 91st section of the British North America Act did not convey to the Dominion any proprietary rights in relation to fisheries; and they drew attention to the distinction which must be borne in mind between rights of property and legislative jurisdiction. Their lordships must certainly not be understood as meaning that under its power to legislate in relation to Dominion railways, the Dominion parliament cannot provide for the expropriation of lands, for example, for this legislative power necessarily implies such a right to interfere with private property, and even with provincial Crown Lands.[4] Neither must they be understood as impugning the power of provincial legislatures to deal freely with vested rights and private property in the province (other than property vested in the Crown as represented by the Dominion Government, as to which item 1 of section 91 of the Federation Act gives the Dominion parliament exclusive power of legislation). This is abundantly clear from their lordships' decision in *The Florence Mining Co.* v. *Cobalt Lake Mining Co.*[5] But then it must be remembered that item 13 of section 92 gives the provincial legislatures exclusive power to make laws in relation to ' property and civil rights in the province.'

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[2] In this connection sec. 117 of the Act must be borne in mind:—'The several provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country.'

[3] (1888) 14 App. Cas. 46.

As regards fisheries, the Privy Council take occasion to say: " At the same time, it must be remembered that the power to legislate in relation to fisheries does, necessarily, to a certain extent, enable the legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion legislature was empowered to pass), might very seriously touch the exercise of proprietary rights, and the extent, character and scope of such legislation is left entirely to the Dominion legislature."

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[4] *Attorney-General of British Columbia* v. *Canadian Pacific R. W. Co.*, [1906] A. C. 204, 11 B. C. 289. As to this case, see further, *infra*, p. 343.

[5] (1910) 102 L. T. 375. See as to this case, *supra*, pp. 34, 83; *infra*, p. 516.

And, in connection with the general subject under consideration, the relation between legislative powers and proprietary rights under the British North America Act, we may refer to the view expressed by Ritchie, C.J., in *Windsor and Annapolis R. W. Co.* v. *Western Counties R. W. Co.,*[6] that though the Dominion parliament has unquestionably the right to legislate as to, and dispose of, any property belonging to the Dominion,[7] it has only the right to dispose of the interest it may have in such property. The question before him was as to the rights of the Dominion parliament to legislate in relation to the Windsor Branch Railway, a provincial railway which had passed to the Dominion at Confederation under schedule 3 and section 108 of the British North America Act, in derogation of certain running powers and other rights over it granted or leased to a certain private railway before Confederation. *Sed quaere.* The Privy Council, on appeal, held, that the Dominion Act in question did not do this, and, therefore they expressed no opinion whatever on the point, which they call, however, "a question of difficulty and importance." And some support to the view of Ritchie, C.J., is to be found, perhaps, in the holding of the Supreme Court in *The Queen* v. *Moss,*[8] that, if a province before Confederation had so dedicated the bed of a navigable river for the purposes of a bridge that it could not have objected to it as an obstruction to navigation, the Crown, as representing the Dominion, on assuming control of the navigation was bound to permit the maintenance of the bridge. But, strangely enough, none of the judgments in *Windsor and Annapolis R. W. Co.* v. *Western Counties R. W. Co.,*[9] take notice of the fact that by No. 1 of section 91, the exclusive power of making laws in relation to the public debt and property is assigned to the Dominion parliament; and the only question is, it is submitted, whether in legislating on such public property, it can or cannot override any vested rights which the property was subject to before Confederation, as well, of course, as any to which it may become subject by act of the Dominion Government or parliament after Confederation, short of its ceasing altogether to be public property of the Dominion. And the answer to this question, it would seem, should, under the authorities, now be in favour of the Dominion power.[10]

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[6] Russ. Eq. at p. 307. In appeal (1882), 7 App. Cas. 178.

[7] Under item 1 of section 91 of the Act.

[8] (1896) 26 S. C. R. 322.

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[9] (1878) Russ. Eq. 287, 383; 3 R. & C. 377; 2 R. & G. 280.

[10] See *supra*, pp. 82-5.

CHAPTER XXIV.

SPECIFIC LEGISLATIVE POWERS — DOMINION AND PROVINCIAL.

Having now set forth the sections of the British North America Act which construct the framework of our Federal Constitution, and having discussed the place and functions therein of the Crown in which is vested the executive power, and having stated and explained such general propositions and principles bearing upon its general scheme and operation as the discussion of it in the Courts and elsewhere, since Confederation, have discovered, we have next to explain the various specific and enumerated legislative powers in sections 91 and 92, so far as the authorities have thrown light upon them, and then to treat of the property provisions of the Act.

DOMINION POWERS.

1. The public debt and property.

The question of Dominion and provincial property under the British North America Act is treated of in Chapter XXIX.[1] See, however, *supra* pp. 228-9.

2. The regulation of trade and commerce.

In *Citizens Insurance Co.* v. *Parsons,*[1a] the Privy Council, to use their own words in their subsequent judgment in *Bank of Toronto* v. *Lambe,*[2] found it " absolutely necessary that the literal meaning of these words ' regulation of trade and commerce ' should be restricted in order to afford scope for powers which are given exclusively to the provincial legislatures." And in their very recent judgment in *City of Montreal* v. *Montreal Street Railway,*[2a] they say:—" Taken in their widest sense these words would authorise legislation by the parliament of Canada in respect of several of the matters specifically enumerated in section 92 and would seriously encroach upon the local autonomy of the province." And so, upon the argument before the Board in the Liquor Prohibition Appeal, 1895,[3] Lord Halsbury, L.C.,[4] is reported as saying with reference to them:—" I think one must bear in mind that you are not at liberty to construe these words in their ordinary natural meaning. You must take the words as used by the legislature. . . I cannot help thinking that you must give what I will call the statutory meaning to those words." And so in *Citizens Insurance Co.* v. *Parsons,*[5] their lordships say that the words " may have been used in some such sense as the words ' regulations of trade ' in the Act of Union between England and Scotland (6 Anne ch. 11), Article

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[1] See pp. 689-739.

[1a] (1881) 7 App. Cas. 96.

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[2] (1887) 12 App. Cas. at p. 581.

[2a] [1912] A. C. at p. 344.

[3] *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A. C. 348.

[4] Transcript from shorthand notes (Wm. Brown & Co., London, 1895), at p. 209.

[5] (1881) 7 App. Cas. at p. 112.

6 of which enacted that all parts of the United Kingdom, from and after the Union, should be under the same 'prohibitions, restrictions and regulations of trade.'" "Parliament has at various times since the Union," they say, "passed laws affecting and regulating specific trades in one part of the United Kingdom only, without its being supposed that it thereby infringed the Articles of Union.[5a] Thus the Acts for regulating the sale of intoxicating liquors notoriously vary in the two Kingdoms." And they come to the conclusion that 'regulation of trade and commerce' in No. 2 of section 91 of the British North America Act, includes "political arrangements in regard to trade, requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and may, perhaps, include general regulations of trade affecting the whole Dominion, but it does not comprehend the power to regulate by legislation the contracts of a particular business or trade (such as the business of fire insurance), in a single province."

And, as to the use of the word 'general' in the above passage — 'general regulation of trade affecting the whole Dominion' — Lord Watson observed, in the course of the argument of the Liquor Prohibition Appeal, 1895,[6] that: "It is apt to be misused, and it is apt to mislead. It is not general as including all particulars, but it is general as distinguished from certain particulars."

[5a] Note the words of the Act are 'the regulation of *trade* and commerce,' not 'the regulation of *trades* and commerce.' It may be that regulation of the customs tariff was what was principally in the mind of the legislator.

[6] At p. 200. See *supra*, p. 203, n.

Their lordships, however, while speaking in this way as to the ' regulation of trade and commerce ' in *Citizens Insurance Co.* v. *Parsons,*[7] expressly say that they abstain from any attempt to define the limits of the authority of the Dominion parliament in this direction. They have themselves referred to their language in two subsequent judgments,[8] but without further elucidating the subject; and although the Dominion power in question has been the subject of much discussion elsewhere, the precise determination of its scope can scarcely be said to have been much advanced. It may still be said, as Lord Watson is reported to have observed on the argument of The Liquor Prohibition Appeal, 1895,[9]: " I do not think any of the cases afford a definition, or anything like a precise definition, of what precisely is meant by the expression ' regulation of trade ' in sub-section 2. There are explanations of it, but the explanations, as far as I can find, require as much explanation as the section itself."

It was in entire accordance with their interpretation in *Citizens Insurance Co.* v. *Parsons* of this Dominion power, that the Privy Council held, in *Bank of Toronto* v. *Lambe,*[10] that it does not prevent any provincial taxation on the persons or companies regulated; and in the Liquor Prohibition Appeal, 1895,[11] that the prohibitive enactments of the Canada Temperance Act cannot be regarded as regulations of trade and commerce; and in *Brewers and Maltsters Association of Ontario* v. *Attorney-General of Ontario,*[12] that an Ontario Act was not *ultra vires* although it required every brewer, distiller, or other person, though duly licensed by the Government of Canada for the manufacture and sale of fermented, spirituous, and other liquors, to take out licenses to sell the liquors manufactured by them, and pay a license fee therefor; and in *Attorney-General of Manitoba* v. *Manitoba License Holders' Association,*[13] that the Liquor Act of Manitoba was *intra vires,* although it included divers prohibitions and restrictions affecting the importation, exportation, manufacture, keeping, sale, purchase, and use of intoxicating liquors, and so, in the words of the judgment, " must interfere with licensed trades in the province of Manitoba, and indirectly at least, with business operations beyond the limits of the province "; and in *Hull Electric Co.* v. *Ottawa Electric Co.,*[14] that a provincial Act validating a municipal by-law granting certain persons an exclusive right of establishing a system of electric lighting for a certain term of years in the city was *intra vires,* notwithstanding that electric light is a commercial commodity, seeing that the scheme in favour of which the by-law was passed was a purely local undertaking, and not the less so because in such cases it is usual, and probably essential for the success of the undertaking, to exclude for a limited time the competition of rival traders.

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[7] (1881) 7 App. Cas. 96.

[8] *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. at p. 586, and *The Liquor Prohibition Appeal*, 1895, [1896] A. C. at p. 363. Judge Clement, however, thinks (Law of Canadian Constitution, 2nd ed., p. 202, n. 4), that their lordships' words in the latter case indicate that a general federal Act regulating trade and commerce might legitimately embrace such provisions as to the insurance trade throughout the Dominion as were contained in the Ontario Act in question in *Citizens Insurance Co.* v. *Parsons.*

[9] At p. 210.

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[10] (1887) 12 App. Cas. at p. 586.

[11] [1896] A. C. 348.

[12] [1897] A. C. 231.

[13] [1902] A. C. 73. As to the power of the Ontario Legislature to prohibit the sale of liquor on vessels on the great lakes, see *Rex* v. *Meikleham* (1905), 11 O. L. R. 366.

[14] [1902] A. C. 237.

Upon the argument before the Privy Council in *Russell* v. *The Queen,* in 1882,[15] counsel for the appellant said: " Any such matters as embargo laws, intercourse between different provinces, coasting regulations, regulations of navigation, and all those sort of matters, I submit, would come within it, but not an Act really dealing with the morals of a people in a particular district, which may be a very small district." And so, in *Hodge* v. *The Queen,*[16] the Privy Council upheld a provincial Act making police or municipal regulations of a merely local character for the good government of taverns, etc., licensed for the sale of liquors by retail; and there have been very numerous decisions in Canadian Courts holding provincial legislation of a local, sanitary, or police character,[17] valid, notwithstanding any effect it might have on particular trades.[18] And in this connection a very apposite citation may be made from Story on the Constitution of the United States,[19]: "The acknowledged powers of the States over certain subjects having a connection with commerce are entirely different in their nature from that to regulate commerce; and, though the same means may be resorted to, for the purpose of carrying each of these powers into effect, this by no just reasoning furnishes any ground to assert that they are identical. Among these are inspection laws, health laws, laws regulating turnpikes, roads and ferries, all of which, when exercised by a State, are legitimate, arising from the general powers belonging to it, unless so far as they conflict with the powers delegated to Congress. They are not so much regulations of commerce as of police."[20]

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[15] Transcript from Marten and Meredith's shorthand notes, 2nd day, at p 18. See *Regina* v. *Holland* (1900), 7 B. C. 281, upholding the provisions of the Dominion Insurance Act, which require fire insurance companies to obtain a license from the Minister of Finance before doing business in Canada (other than companies carrying on business exclusively within the province by the legislature of which they were incorporated), as within the terms 'regulation of trade and commerce.'

[16] (1883) 9 App. Cas. 117.

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[17] As to the phrase "police regulations," see *infra*, p. 584.

[18] See Legislative Power in Canada, at pp. 455-456; also *ibid.*, p. 559, n. 3, where many cases of this sort are referred to, to which may now be added: *Smylie* v *.The Queen* (1900), 27 O. A. R. 172, 31 O. R. 202; *Rex* v. *McGregor* (1902), 4 O. L. R. 198, 204; *Stark* v. *Shuster* (1904), 14 Man. 672; *Re Fisher and Village of Carman* (1905), 16 Man. 560; *Re Brown and City of Calgary* (1906), 5 W. L. R. 576; *DeVarennes* v. *Le Procureur Général*, R. J. Q. (1907), 16 K. B. 571, in app. 31 S. C. R. 444; *City of Montreal* v. *Beauvais* (1909), 44 S. C. R. 211; *Re Foster and Township of Raleigh* (1910), 22 O. L. R. 26, 342; Report of Minister of Justice of Nov. 14, 1899, on a British Columbia Act purporting to make void as against an alien immigrant, a contract of service entered into by him before coming to the province: Provincial Legislation, 1899-1900, at p. 105. See also, *ibid.*, at p. 121.

[19] 5th ed., vol. 2, at p. 14.

[20] The power of Congress is not so wide as the Dominion power. It is to 'regulate commerce with foreign nations, and among the several States, and with the Indian tribes:' Constitution of United States, Art. 1, sec. 8 (3).

3. The raising of money by any mode or system of Taxation.

As the Privy Council point out in *Citizens Insurance Co.* v. *Parsons,*[21] the description of this Dominion power is sufficiently large and general to include ' direct taxation within the province in order to the raising of a revenue for provincial purposes,' assigned to the provincial legislatures by No. 2 of section 92, but it obviously could not have been intended that the general power should over-ride the particular one. All other power to impose direct taxation, however, is exclusively in the Dominion under this sub-section. But as we shall see no narrow construction has been given to the words ' for provincial purposes.'

So, again, notwithstanding the exclusive provincial power under No. 9 of section 92 to make laws in relation to ' shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes,' the Dominion parliament, also, can tax by means of licenses. Thus in the *Fisheries* case,[22] the Privy Council say that it is impossible to exclude as not within the power we are considering, a Dominion provision imposing a tax by way of license as a condition of the right to fish in sea coast and inland fisheries.

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[21] (1881) 7 App. Cas. at p. 108. As to what is 'direct taxation,' see *infra*, pp. 393-9.

[22] *Attorney-General of Canada* v. *Attorney-General of the Provinces*, [1898] A. C. 700, at pp. 713-4. And see, also, as to both the Dominion parliament and the provincial legislatures having power to tax by means of licenses, per Taschereau, J., in *Angers* v. *Queen Insurance Co.* (1877), 16 C. L. J. N. S. at pp. 204-5; per Ritchie, C.J., in *Severn* v. *The Queen* (1878), 2 S. C. R. at p. 101.

There is, of course, nothing to prevent the parliament of Canada, or the provincial legislatures, legislating retrospectively in relation to subject-matters within their respective jurisdictions. And so, in *Attorney-General* v. *Foster,*[23] a Dominion Act respecting customs duties, which was only assented to on May 16th, 1890, was, nevertheless, held *intra vires* in providing that it should be held to have come into force on March 28th, 1890, and to have applied to all goods imported or taken out of warehouse for consumption on or after the latter date. At p. 173, Allen, C.J., calls attention to section 122 of the British North America Act, which declares that the customs and excise laws of each province shall continue in force until altered by the parliament of Canada.

In another recent case it has been held,[24] that under this No. 3 of section 91, the Dominion parliament has legislative authority to impose a customs duty upon a foreign-built ship to be paid upon application by her in Canada for registration as a British ship, there being no repugnancy between this and any Imperial enactment extending to Canada.

Section 125 of the British North America Act specially provides that 'no lands or property belonging to Canada or any province shall be liable to taxation'; the cases, however, which have arisen under this section, concern provincial, and not Dominion taxation, and will be noticed under No. 2 of section 92.[25]

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[23] (1892) 31 N. B. 153.

[24] *Algoma Central R. W. Co.* v. *The King* (1901), 7 Ex. C. R. 239.

[25] *Infra*, pp. 415-7.

In conclusion, it may be noticed that in entire accordance with that omnipotence of Canadian legislatures within their respective spheres, which is one of the points in which, in the words of the preamble of the British North America Act, the Dominion has ‘ a Constitution similar in principle to that of the United Kingdom,’ there is no such necessity for uniformity and equality of taxation with us as exists in the United States, where the Constitution provides, by Article 1, section 3, that ‘ direct taxes shall be apportioned among the several States . . . according to their respective numbers,’ etc., and by Article 1, section 8, that ‘ all duties, imports, and excises, shall be uniform throughout the United States ’; and that ‘ no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.’

4. The borrowing of money on the public credit.

5. Postal service.

6. The Census and Statistics.[25a]

7. Militia, military and naval service and defence.

[25a] As Clement says with regard to this power (*op. cit.* p. 207, n. d.) ‘Any construction other than “the census and statistics in relation thereto” would land one in difficulties.’ There seems to be no reported expression of judicial opinion upon it.

It would seem that in *City of Montreal* v. *Gordon*,[26] the Supreme Court held that the parliament of Canada had no constitutional right to impose in the Militia Act civil obligations upon any provincial municipality for the payment of the troops. The only other citation to be made under this sub-section seems to be an observation of the Privy Council in *Cunningham* v. *Tomey Homma*,[27] where it was argued that a British Columbia Act which enacted that no Japanese, whether naturalised or not, should have his name placed on the register of voters, or be entitled to vote at the elections for the provincial legislature, was *ultra vires*, because under No. 25 of section 91, the Dominion parliament has exclusive power to legislate in relation to ' Naturalization and Aliens.' They say that it might with equal force be argued that because No. 7 of section 91 gives the Dominion parliament exclusive legislative authority as to ' Militia, Military and Naval Service and Defence,' therefore, the Dominion parliament has the exclusive authority to confer the provincial electoral franchise upon the militia.

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[26] (1905), Coutlee's Cas. 343, reversing the Court below (1903), R. J. Q. 24 S. C. 465. As to taxing soldiers and sailors, see per Robinson, C.J., in *Tully* v. *The Principal Officers of Her Majesty's Ordnance* (1847), 5 U. C. R. at p. 14. See, also, an Article on 'The Law Applicable to the Militia of Canada,' by W. E. Hodgins: (1901), 21 C. L. T. 169; and another Article on the same subject in 37 C. L. J. 214. The decision of Chauveau, J., in *Holmes* v. *Temple* (1882), 8 Q. L. R. 351, holding this power to be exclusive of the Imperial parliament, so that the Imperial Army Act could not apply to make the Canadian public liable for offences under it (*i.e.*, in this case, attempting to persuade a member of the Active Militia of Canada to desert), though the same are not offences under the Militia Act of Canada, is of course not longer supportable. See *supra*, pp. 51-8. *Cf. Reg.* v. *Schram* (1864), 14 C. P. 318, a case, however, before Confederation.

[27] [1903] A. C. 151.

8. The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada.[28]

9. Beacons, buoys, lighthouses, and Sable Island.

10. Navigation and shipping.[28a]

This power entitles the Dominion parliament to declare what shall be deemed an interference with navigation. Thus in the *Fisheries* case,[29] the Privy Council say: "Their lordships entertain no doubt that the Dominion parliament had jurisdiction to pass the Act, intituled: 'An Act respecting certain works constructed in or over navigable waters.' It is, in their opinion, clearly legislation relating to 'navigation.' In *McMillan* v. *Southwest Boom Co.*,[30] the New Brunswick Supreme Court had held that this Dominion power was not intended to include the right to authorize the erection of booms for securing lumber in the rivers of the province, but that the phrase 'navigation and shipping' was used in the sense in which it was used in the Imperial Acts relating to 'navigation and shipping'; and meant the right to prescribe rules and regulations for vessels navigating the waters of the Dominion. And as to the validity of the Dominion Act respecting the navigation of Canadian waters, and the applicability of its provisions to collisions occurring therein, see *The Eliza Keith,*[31] and *The Hibernian.*[32] It is not apparently material at what port a British vessel is registered, whether, *e.g.,* she is registered in the Dominion, or in Great Britain.[33]

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[28] As to the provincial power to tax the salaries of Dominion officials, see *supra*, pp. 417-421.

[28a] As to Admiralty jurisdiction in the Dominions, generally, see Keith's Responsible Government (1912), Vol. 3, pp. 1348-56. As to the Imperial Merchant Shipping Acts, see *supra*, pp. 55-6.

[29] [1898] A. C. 700, at p. 717, affirming the Supreme Court, 26 S. C. R. 444. *Cf.* a similar power in Congress by virtue of its right to regulate commerce with foreign nations and among the several States: Story on the Constitution, 5th ed., vol. 2, pp. 16-7, n. (a).

[30] (1878) 1 P. & B. 715.

In *McCaffrey* v. *Hall,*[34] the Quebec Superior Court held *intra vires* a local Act whereby certain persons were authorized to erect piers and booms in the River Nicolet 'provided always that the said piers and booms shall be so constructed and placed, as in no way to interfere with or obstruct the crossings, or free intercourse and navigation of said river.' And in *Wood* v. *Esson,*[35] it was held that the Crown for the province cannot grant a water-lot extending into navigable waters so as to enable the grantee to construct or erect any wharf or other obstruction that will interfere with navigation without proper legislative authority.

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[31] (1877) 3 Q. L. R. 143.

[32] L. R. 4 P. C. 511, at pp. 516-7. And see Legislative Power in Canada, p. 641, n. 2. *Cf.*, also, *The Farewell* (1881), 7 Q. L. R. 380.

[33] *Rhodes* v. *Fairweather* (1888), Newfoundland Decisions, p. 337.

[34] (1891) 35 L. C. J. 38.

[35] (1884) 9 S. C. R. 239.

But this Dominion power does not prevent the valid incorporation of provincial navigation companies. Thus, in *Macdougall* v. *Union Navigation Co.*,[36] the Quebec Court of Queen's Bench held *intra vires* a Quebec Act incorporating such a company, the operations of which were limited to the province, for ' carrying on any forwarding business, and the constructing, owning, chartering or leasing ships, steamboats, wharves, roads or other property required for the purpose of such forwarding business,' as a local work or undertaking under Number 10 of section 92. And so per Taylor, C.J., in *Re Lake Winnipeg Transportation Lumber and Trading Co.*,[37] who says: " Legislation on ' navigation and shipping ' would seem rather to deal with such matters as the law of the road, lights to be carried, how vessels are to be registered, evidence of ownership and title, transmission of interest and such matters."

But such a provincial corporation may find that, in order to the effectual execution of its corporate purposes it has to have recourse to the Dominion legislature or officers. Thus, in a report of February 23rd, 1910, as Minister of Justice, Sir Allen Aylesworth says, of a New Brunswick Act authorising the City of St. John to build a bridge across the Harbour of St. John: "This Act while it may operate to confer capacity upon the corporation of St. John to construct and maintain a bridge across the harbour, cannot give any title to the city to construct works upon the harbour bed or in or over navigable waters. It is, however, necessary, if the bridge is to be constructed by the city, that the corporate powers of the City should be enlarged accordingly, and in that view the undersigned considers that the Act should be left to its operation, and he presumes that, of course, the City authorities will obtain the necessary Dominion authority and sanction before proceeding with the work." And so in *Queddy River Driving Boom Co.* v. *Davidson,*[38] the Supreme Court held *ultra vires* a provincial Act purporting to incorporate a boom company with power to obstruct by piers and booms a public tidal and navigable river, as trenching on the exclusive jurisdiction of the Dominion over 'navigation and shipping'; and because, inasmuch as the objects of the company involved interference with navigation, they could not be said to be 'provincial objects,' within No. 11 of section 92. But it is competent for the Dominion parliament to incorporate under Dominion charter the members of a provincial company, and so enlarge the scope of their operations and powers; but *quaere,* whether a provincial legislature can confer on a company incorporated by Dominion charter, enlarged powers and franchises, thus, in effect, amending the provisions of a Dominion Act of incorporation.[39]

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[36] (1877) 21 L. C. J. 63. See, also, *Union Navigation Co.* v. *Couillard* (1875), 7 R. L. 215.

[37] (1891) 7 M. R. at p. 259. For a general discussion of the Dominion power in respect to shipping, see *Algoma Central R. W. Co.* v. *The King* (1901), 7 Ex. C. R. 239. In *The King* v. *Martin* (1904), 36 N. B. 448, the Supreme Court of New Brunswick held *intra vires* a Dominion enactment forbidding, under penalty of imprisonment, enticing seamen to desert from their ship, or harbouring such deserters.

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[38] (1883) 10 S. C. R. 222. And see Legislative Power in Canada, p. 641, n. 2. *Cf. Reg.* v. *Fisher* (1891), 2 Ex. C. R. 365, where held that a grant from the Crown which derogates from a public right of navigation is to that extent void, unless such interference with navigation is authorized by Parliament, and that if by a provincial Act passed before Confederation, authority has been given to the Crown by its grant to derogate from, or interfere with, the public right of navigation, that authority is, since the Union, exercisable by the Governor-General in Council, and not by the Lieutenant-Governor in Council.

Again, the late Sir John Thompson, reported on January 28th, 1889,[40] favourably in regard to a Nova Scotia Act in relation to public health, which authorised the Governor-in-Council to regulate—' so far as this legislature has jurisdiction in this behalf, with a view of preventing the spread of infectious diseases, the entry or departure of boats or vessels at the different ports or places in Nova Scotia,' saying: " The British North America Act gives exclusive legislative power to the parliament of Canada in respect of quarantine, navigation, and shipping. It would clearly not be competent for a provincial legislature to make an enactment relating to the arrival of vessels, vehicles, passengers, or cargoes from places outside the province, but it may be that provincial control may be exercised in relation to transport from one port of the province to another, subject, of course, to any regulation on the subject of quarantine by the federal authority."

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[39] See, further, on the whole subject, Legislative Power in Canada, p. 633, n. 2, and *infra*, pp. 480, 483. A provincial legislature may extend the boundaries of a municipality so as to include part of a navigable river: *Central Vermont R. W. Co.* v. *Town of St. Johns* (1886), 14 S. C. R. 288. "If it is beyond controversy that navigable rivers are for purposes of navigation under the control of the parliament of Canada, it is not less true that the provinces have, upon these same rivers, the right to exercise all municipal and police powers, so long as their legislation creates no hindrance to navigation:" per Fournier, J., S. C. at p. 297, cited Clement *op. cit.* p. 211. As to provincial Crown grants extending into navigable waters see *Queen* v. *Fisher* (1891), 2 Ex. C. R. 365; *Queen* v. *St. Johns Gas Light Co.* (1895), 4 Ex. C. R. 326, at p. 346, where held that a provincial legislature cannot legalize such an interference with or injury to the right of navigation or fishery as would amount to a nuisance; *In re Provincial Fisheries* (1896), 26 S. C. R. at p. 575; *Normand* v. *St. Lawrence Navigation Co.* (1879), 5 Q. L. R. 215; *Lake Simcoe Ice Co.* v. *McDonald* (1900), 29 O. R. 247, 26 O. A. R. 411, 31 S. C. R. 130.

[40] Hodgins' Provincial Legislation, 1867-1895, p. 582. *Cf. ibid.* at pp. 946-7.

It was under this Dominion power, in conjunction with that over the regulation of trade and commerce, and with that under section 101 of the British North America Act to establish Courts for the better administration of the laws of Canada, that in the case of *The Picton,*[41] the Supreme Court affirmed the validity of the Dominion Act constituting the Maritime Court of Ontario.

Lastly, in *Longueuil Navigation Co.* v. *City of Montreal,*[42] it was held that, notwithstanding that ' navigation and shipping ' is placed under Dominion jurisdiction, a Quebec Act authorising the levy of a tax upon ferryboats, including steamboats carrying passengers and goods between Montreal and places not distant more than nine miles, was *intra vires.*

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[41] (1879) 4 S. C. R. 648. *Cf. Attorney-General* v. *Flint* (1884), 16 S. C. R. App. at p. 707. In the case of *The Farewell* (1881), 7 Q. L. R. 380, it was held that the Dominion parliament may confer jurisdiction on a Vice-Admiralty Court on any matter of shipping and navigation within the territorial limits of the Dominion. As to sec. 101, see *infra*, pp. 672-688.

[42] (1888) 15 S. C. R. 566.

11. Quarantine and the establishment and maintenance of Marine Hospitals.[43]

12. Sea coast[43a] **and inland fisheries.**

The scope of this Dominion power has been defined by the Privy Council in the *Fisheries* case,[44] having been first discussed by the Supreme Court in that case in the Court below,[45] and in their previous decision in *The Queen* v. *Robertson.*[46] The Privy Council affirm the Supreme Court in holding that the legislative authority of the Dominion parliament is confined to the enactment of fishery regulations and restrictions, and does not extend to direct interference with proprietary rights in fisheries, as by authorizing the giving by lease, license, or otherwise, the right of fishing in navigable or non-navigable lakes, rivers, streams, and waters, the beds of which had been granted to private proprietors before Confederation, or not having been so granted are assigned to the provinces under the British North America Act.[47] At pp. 712-716 their lordships say: "Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively, remain untouched by that enactment" (*sc.* No. 12 of section 91). "Whatever grants might previously have been lawfully made by the provinces in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time, it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent, enable the legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion legislature was empowered to pass), might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion legislature."

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[43] See report of Sir John Thompson of January 28th, 1889, *supra*, pp. 245-6.

[43a] Clement, *op. cit.* p. 213, calls attention to 'the curious error' into which Lord Selborne, L.C., fell in *L'Union St. Jacques* v. *Belisle* (1874), L. R. 6 P. C. at p. 37, in not treating 'sea coast,' as 'an adjective,' (*qu. two* adjectives), and speaking of it as putting "the whole of the sea coast within the exclusive cognizance of the Dominion legislature."

[44] *Attorney-General of the Dominion* v. *Attorney-General of the Provinces*, [1898] A. C. 700.

[45] 26 S. C. R. 444.

[46] (1882), 6 S. C. R. 52. Clement, *op. cit.* p. 216, queries the words of the judgment in this case (*infra*, p. 248), so far as it seems to hold that the provincial legislatures cannot pass laws with reference to the improvement and the increase of the fisheries. The fisheries, he observes, are provincial assets. He also cites *Re Lake Winnipeg Transportation and Lumber Co.* (1891), 7 Man. L. R. 255, as showing that a provincial Act incorporating a company with power to catch and cure fish is not an Act in relation to 'fisheries' within the meaning of the power under consideration, but falls under No. 11 of section 92, 'the incorporation of companies with provincial objects.'

The Privy Council further dealt with the question raised before them as to whether provincial legislatures might not, also, make fishery regulations so far as not inconsistent with Dominion legislation. As to this they say, at pp. 715-716: "It has been suggested, and this view has been adopted by some of the judges of the Supreme Court, that although any Dominion legislation dealing with the subject would override provincial legislation, the latter is nevertheless valid, unless and until the Dominion parliament so legislates. Their lordships think that such a view does not give their due effect to the terms of section 91, and in particular to the word 'exclusively.'[48] . . Their lordships feel constrained to hold that the enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion legislature, and is not within the legislative power of provincial legislatures. But whilst in their lordships' opinion all restrictions or limitations by which public rights of fishing are sought to be limited or controlled can be the subject of Dominion legislation only, it does not follow that the legislation of provincial legislatures is not competent merely because it may have relation to fisheries. For example, provisions prescribing the mode in which a private fishery is to be conveyed or otherwise disposed of, and the rights of succession in respect of it, would be properly treated as falling under the heading 'property and civil rights' within section 92, and not as in the class 'Fisheries' within the meaning of section 91. So, too, the terms and conditions upon which the fisheries which are the property of the province may be granted, leased, or otherwise disposed of, and the rights which consistently with any general regulations respecting fisheries enacted by the Dominion parliament may be conferred therein, appear proper subjects for provincial legislation, either under class 5 of section 92, ' the management and sale of public lands,' or under the class ' property and civil rights.' Such legislation deals directly with property, its disposal, and the rights to be enjoyed in respect of it, and was not, in their lordships' opinion, intended to be within the scope of the class ' Fisheries ' as that word is used in section 91.' The Supreme Court[49] had held that the provincial legislatures had jurisdiction to regulate times and modes of fishing in provincial waters, subject to any Dominion legislation in relation to sea coast and inland fisheries. Gwynne, J., who dissented from the other judges on the point, adds, however (at p. 545) : " I do not think that any Act or part of an Act of a provincial legislature, passed for the purpose of aiding in the protection of fisheries as provided by an Act of the Dominion parliament, would be held to be *ultra vires* as being legislation upon a subject, namely, the ' fisheries,' which is exclusively within the jurisdiction of the Dominion parliament, however inoperative and unnecessary such provincial legislation might be; but, unless so in aid of the legislation of the Dominion parliament, I am of opinion that the subject is not within the jurisdiction of the provincial legislatures."

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[47] See *supra*, p. 226, as to this case. As to the right of fishing in navigable and floatable rivers in Canada being exclusively in the Crown, see *Wyatt* v. *Attorney-General of Quebec* [1911] A. C. 489.

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[48] See *supra*, pp. 107-111; 120-122;; 128-132.

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[49] (1896) 26 S. C. R. 444.

Basing itself upon the decision of the Privy Council in the *Fisheries* case, the Supreme Court of Nova Scotia held, in *Young* v. *Harnish*,[50] that the Dominion Fisheries Act, R. S. C. 1887, ch. 95, sec. 4, was *ultra vires* in so far as it empowered the grant of exclusive fishing rights even over a public harbour, and that fisheries do not necessarily constitute a part of such a harbour. In this case the plaintiff held a license obtained from the Marine and Fisheries Department of Canada under the above Fisheries Act, authorizing him to fish in the public waters of St. Margaret's Bay in Nova Scotia; and an Order in Council made under the Act provided, under penalties, that no seine should be drawn or any net set within a certain distance of any weir, trap, or net of any kind under license. Graham, E.J., with whom the rest of the Court concurred, says (pp. 220-221): "It can be seen that the license fixes the locality of the plaintiff's traps, and that the effect of the Order in Council excludes all others for 1-8th of a mile round his trap. That appears to bring the effect of the license and the Order in Council within the condemnation of the decision referred to. It was contended that public harbours belong to the Dominion, and that the place in which the traps were set formed part of a public harbour. Very likely this is so, but, if I understand the case just cited" (*sc.* the *Fisheries* case), "I think these fisheries do not necessarily constitute a part of the harbour. The harbours may afford a protection to the nets or traps and boats of the fishermen. When the nets or traps constitute an obstruction to the navigation, the Dominion authorities may, no doubt, by regulations, interfere. But, if the fore-shore on the margin of a harbour, according to that case, may or may not, according to circumstances, form part of a harbour, I think the fishing is not necessarily part of the harbour . . For some purposes, as for the necessities of navigation, or for preserving or making more productive the fisheries, the Dominion authorities may apparently, by regulation, exclude the fishermen from setting traps, nets, etc., in some places altogether, or permit them to be set only at long intervals apart and at some seasons, but, apparently, they cannot by the effect of any such legislation give any fisherman an exclusive right to fish in any particular place. It is not necessary in this view to deal with the question of the right of the Crown, either for the Dominion or the province, to give anyone an exclusive right of fishing in a navigable arm of the sea."

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[50] (1904) 37 N. S. 213.

In *Miller* v. *Webber,*[51] Graham, E.J., held, that under the decision of the Privy Council in the *Fisheries* case,[52] the provisions of the Dominion Fisheries Act, R. S. C. 1906, ch. 45, sec. 47, sub-sec. 7, that: ' No one shall use a bag-net, trap-net, or fish pound, except under a special license, granted for capturing deep-sea fish other than salmon,' is *intra vires* even as applied to a net set in waters (not being a public harbour), within three miles of the shore; and referring to *Young* v. *Harnish,* just cited, he says (p. 464), that a distinction may be drawn, and, perhaps, should have been drawn in that case between leases and licenses.

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[51] (1910) 8 E. L. R. 460.

[52] [1898] A. C. 712, 713.

As regards inland waters the Privy Council decision settled the matter, and since 1898 the provinces of Quebec and Ontario issue all fishery licenses in non-tidal waters, the making and enforcing of the regulations governing the times and methods of fishing remaining with the Dominion.

With respect to tidal waters and non-tidal waters within the Railway Belt in British Columbia, the following questions were brought before the Supreme Court on a recent Reference under section 60 of the Supreme Court Act (R. S. C. 1906, c. 139) in November, 1912, and all answered in the negative by their judgment of February 18th, 1913.[53]

1. Is it competent to the legislature of British Columbia to authorise the Government of the province to grant by way of lease, license, or otherwise, the exclusive right to fish in any or what part or parts of the waters within the Railway Belt, (a) as to such waters as are tidal, and (b) as to such waters as though not tidal, are in fact navigable?

2. Is it competent to the legislature of British Columbia to authorise the Government of the province to grant by way of lease, license, or otherwise, the exclusive right, or any right, to fish below low water mark in, or in any or what

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[53] 47 S. C. R. 493. Leave has been granted to appeal to the Privy Council.

part or parts of, the open sea within a marine league of the coast of the province?

3. Is there any and what difference between the open sea within a marine league of the coast of British Columbia, and the gulfs, bays, channels, arms of the sea, and estuaries of the rivers within the province, or lying between the province and the United States of America, so far as concerns the authority of the legislature of British Columbia to authorise the government of the province to grant by way of lease, license, or otherwise, the exclusive right, or any right, to fish below low water mark in the said waters or any of them?

All these questions, as already mentioned, have been answered by the Supreme Court in the negative. Idington, J., says: "There can be no doubt that the right to fish in the sea and all its arms on the coast of British Columbia has been a public right enjoyable by everybody, and must so remain until the Dominion parliament signifies otherwise, as for example, by declaring that it will be for the good of the whole of Canada that a several or exclusive right of fishing may be granted. There may be a question whether or not the province could grant an exclusive license anticipating and conditional upon and subject to the legislative regulations to be provided by Parliament. . . I cannot overlook the comprehensive language of the exclusive power given Parliament over 'sea, coast, and inland fisheries,' and coupled therewith the predominant feature of our whole scheme of Confederation, which is that to those who are to be directly affected by the exercise of any power is entrusted the power of due and proper rectification of any misuse of such power. This power of granting exclusive licenses to fish in the waters of British Columbia, so touches the welfare of the whole people of Canada, not only in relation to their food, but also in the widest areas of national life, in so many and diverse ways that a book might be written thereon. I think the people who may be affected by its operation must be declared virtual masters, through their Parliament, of the situation. . Even if the right to fish in non-tidal but navigable waters may differ from those other rights, all seem so classed together by the British North America Act that I think the right of the province in either case must be treated for all practical purposes as resting on the one common basis of the regulations of Parliament:" (pp. 495-8).

Duff, J., observes (p. 502): " It is not necessary to consider the very important question whether the bed of the open sea within the three-mile limit is, or is not, vested in the Crown in right of the province." As to this, see *infra* pp. 259-262. At p. 503, 5, he says: " It is clear I think that the beds of non-tidal waters, whether navigable or not, do not, according to the law of British Columbia belong to the Crown *jure prerogativæ.* . I do not think there is the slightest ground for holding that in this matter the rule of the common law did not come into force *simpliciter."* He also says, (p. 509): " Whether on its introduction into British Columbia the law of England underwent such a modification as to require us to hold that in every body of water in that province which is capable of navigation (the bed of which is vested in the Crown), a right or privilege of fishing belongs to the public, and if there be such a right or privilege what is the nature of it, are questions involving points of far reaching importance which ought only to be passed upon after hearing argument in the interest of those private owners who might be affected by the decision, and who were not represented on the hearing of this Reference. . The beneficial ownership of the beds of navigable non-tidal waters within the Railway Belt that were vested in the Crown at the date of the transfer passed to the Dominion; and with the ownership of the beds the fisheries passed also as ordinary profits of the soil unless at the date of the Union the title of the Crown was burdened with a public right of fishing that was only capable of being restricted or limited through the exercise of legislative authority. If such a public right did exist in respect of the fishings in the waters in question then by the operation of the British North America Act as construed in the *Fisheries* case, [1898] A. C. 700, the Dominion parliament became solely invested with legislative authority to limit or restrict that right."

Anglin, J., reiterates the view expressed by him in *Kenora Case*,[53a] as to the inapplicability to the great stretches of fresh water in this country which are navigable in fact of the rule of the English common law, which treats as navigable only such waters as are tidal, but considers it unnecessary here to determine that important point, since in either view, the British Columbia legislature cannot authorise grants of exclusive rights to fish in these waters in the Railway Belt: and adds (p. 512): "I cannot accept the contention pressed on behalf of British Columbia that the interest of a province in the ordinary fisheries in provincial waters which should be deemed navigable in law is a *jus regale* of the same nature as its rights to the precious metals which were held not to be *partes soli,* and were on that account excluded from the operation of the grant of the Railway Belt lands: *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1889), 14 App. Cas. 295. A public fishery will not pass by a Crown grant of the *solum* of the water in which it exists, or indeed of the fishery itself in express terms, not because such a fishery is not *pars soli,* but because the *solum* itself, vested by law in the Crown, is subject to a trust to preserve the public rights of navigation and of fishing, which the competent legislature alone can extinguish. But the precious metals do pass under a Crown grant which contains language apt to convey them. Legislative action is not requisite. On the other hand any fishery vested in the Crown in waters of which it owns the *solum,* other than a public common of piscary existing by law, with which a province is not competent to interfere, is held not by prerogative but by proprietary title."

[53a] *Keewatin Power Co.* v. *Town of Kenora* (1906), 13 O. L. R. 237. In app., 16 O. L. R. 184.

In a communication of May 14th, 1901, to the Dominion Government,[53b] the Premier of Ontario states that: "The limited authority conceded to the provincial legislature by the British North America Act, as interpreted by the Privy Council, is entirely inadequate for the proper protection of the fisheries of the province. So long as the Dominion Government is prepared to pass proper regulations for the protection of fish in the waters of the province, no harm may arise, but the undersigned is of the opinion that, as the proprietary right in the fish by the judgment of the Privy Council is vested in the province, the province should have all the powers necessary to protect its own property, even to the extent of defining the close season for fishing in the waters of the province, and limiting the quantity of fish to be taken, and the mode of taking the same, as the legislature of the province may deem expedient. In the opinion of the undersigned it would, therefore, be desirable that steps be taken, by conference with the Dominion Government, to secure the amendment of the British North America Act extending the powers of the province in the direction herein indicated."

[53b] Provincial Legislation, 1899-1900, at p. 47.

When in 1899 the Nova Scotia legislature enacted a provision enabling the Governor in Council to authorize the leasing of fish traps and weirs on any part of the coast of Nova Scotia, the Dominion Government objected that this was a matter of the regulation of the fisheries, stating, in a communication of the Deputy-Minister of Justice to the provincial Attorney-General, of April 18th, 1900: "What the section seems really to intend is to enable the Lieutenant-Governor in Council to authorize the use of traps or weirs on any place on the coast to be specified. This he certainly could not do except where consistent with Dominion legislation. As to leasing the bed of the sea within the three-mile limit, it is, at least, doubtful whether a provincial legislature has any authority." The provincial Government, however, avoided disallowance by undertaking to repeal the objectionable section.[54] The provincial Attorney-General, in a communication of April 25th, 1910, to the Minister of Justice, in connection with this matter, says: "The real fact of the case is that the water, the navigation, and the control and regulation of fisheries of the foreshore are in the Dominion, but the *terra firma,* the land under this water, is undoubtedly an extension of the property in the land, which the British North America Act vests in the province."

In *The King* v. *The Ship North,*[55] it has been held, affirming Martin, Local Judge of the British Columbia Admiralty District, that the decision of the Privy Council in the *Fisheries* case does not mean that the Dominion parliament has not power to absolutely prohibit foreign nations from fishing within the three-mile limit of the coast of Canada, and that the federal Government has no police jurisdiction.[55a] Martin

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[54] Provincial Legislation, 1899-1900, at p. 58.

[55] (1906) 37 S. C. R. 385, 11 Ex. C. R. 141, 148-150, 11 B. C. 473.

[55a] In Newfoundland Decisions (J. W. Withers, Queen's Printer, St. John's, N. F., 1897), *Rhodes* v. *Fairweather* (1888), at p. 321, and *Queen* v. *Delepine* (1889), at p. 378, the question of the territorial limits of the jurisdiction of the local legislature is

L.J.A., cites from that portion of their lordships' judgment in which they speak of the power of the Dominion parliament to impose a tax by way of license as a condition of the right to

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discussed and found to extend to, but not beyond, three miles outside of a line drawn from headland to headland of the bays of Newfoundland. The former of these cases was an action for penalties against the master of a British ship, registered in Scotland, for killing and taking on board seals previous to the date fixed by the legislature of Newfoundland for sealing, the seals in question having been all taken outside the above limits. The owners and masters of the ship resided in Scotland, and also several of the crew, who were engaged there. She cleared from St. John's for the seal fishery, and returned there after the voyage for the purpose of manufacture and shipment. Carter, C.J., after referring to Imperial Acts in reference to offences committed on board British ships, says, at p. 325: "Has the legislature of this colony authority to pass an Act conferring jurisdiction of the like character over persons on board a ship on the high seas beyond colonial limits, whether registered in this colony or other British port? I apprehend it has not. Then by what authority can it prohibit or confer the right of killing seals beyond its territorial limits? The *Terra Nova*" (the defendant's ship) "is a ship of the British nation, and as such the Imperial parliament would unquestionably be competent to give effect to an Act prohibiting with penalties the killing of seals or such like, at a specified time, anywhere over the sea, by persons on board said ship, but that is from supreme, and unlike colonial limited authority." Little, J., at p. 343, after referring to the class of Imperial Acts above mentioned, says: "This sovereign authority rendering the subject amenable under such circumstances to Imperial laws is inherent in the State or nation; and, as a colony is only a part of the State which created it, it is obvious it cannot exercise these powers which pertain alone to the nation or State creating it." Still he is less positive in denying the power of the legislature in such a case as that before the Court, saying rather that the statute should not be construed to apply to such a case in the absence of any express language showing an intention on the part of the legislature that its provisions might operate beyond the territorial limits of the colony. Pinsent, J., thought the defendant should be held liable. He says, at pp. 333-4:—"I take it to be a sound doctrine, as a general proposition, that the limits of colonial jurisdiction extend to only three miles from the shore, and that a colonial legislature cannot confer a jurisdiction beyond its fish,[56] and says (p. 149): " It is within the competence of the federal power to exercise the sovereign rights which have been delegated to it by the British North America Act, and protect in the interest of the nation at large, those fisheries which it is authorized to regulate and license. I can find nothing in the *Fisheries* case which goes to support a different view "; and in the Supreme Court, Sedgewick, J., adopts his reasons. Davies, J., with whom Maclennan, J., concurs, meets the objection raised that the fisheries along the coast belong to the province,

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territorial limits, but here the exercise of the jurisdiction is upon persons and things within the limits, although it may be for acts done in violation of our law outside those limits . . We have here to guard against confounding the territorial limits of the government with the power of legislation over persons and things, between which there is no necessary coincidence, except as to the place of putting the law in execution against persons who owe subjection to it." In his opinion the defendant, his ship, and ship owners, bore such a relation to the colony that the legislation was *intra vires* to control them in their fishing operations, even when outside the three-mile limit. But he adds, at p. 334: " If the case now before us were one of a foreign cruiser at sea, prosecuting the business from a foreign port, and taking seals outside the colonial limits, there could be no doubt the Act would have no application." The other case above referred to, *The Queen* v. *Delepine*, was one in which the defendants (foreign fishermen) were proceeded against before a magistrate for violation of the Newfoundland Bait Act, 50 Vict. c .1, namely, purchasing bait fishes for exportation and bait purposes, without having taken out the license provided for in said Act. Here, too, it was held that the territorial jurisdiction of the local legislature extends to three miles outside a line drawn from headland to headland; and, as in *Rhodes* v. *Fairweather*, *supra*, special reference is made to *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.*, a decision of Hoyles, C.J., to that effect, affirmed in appeal to the Privy Council: (1877), 2 App. Cas. 394. See, also, *The Ship Frederick Gerring, Jr.* v. *The Queen* (1897), 27 S. C. R. 271; *The Farewell* (1881), 7 Q. L. R. 380. See, also, *supra*, pp. 103-5; 184.

[56] *Infra*, p.

and not to the Dominion, and that the legislation for their protection should have been provincial and not Dominion, by saying (pp. 392-3): "The simple answer to such objections is that the British North America Act, 1867, conferred upon the Dominion the exclusive power of legislation with respect to sea coast and inland fisheries, and that the judgment of the Judicial Committee in *Attorney-General of Canada* v. *Attorney-General of the Provinces,*[57] determines affirmatively the exclusive right of the Dominion parliament to make or authorize the making of regulations and restrictions respecting the fisheries of Canada." For the rest he, as does also Idington, J., rests his decision, supporting that of Martin, L.J.A., upon the construction of the Dominion Act respecting fishing by foreign vessels, viewed in the light of the recognized rules of international law.

Lastly, in the *Fisheries* case, the Privy Council say (at pp. 713-4): "In addition to the legislative power conferred by the 12th item of section 91 ('Sea coast and inland fisheries') the 3rd item of that section confers upon the parliament of Canada the power of raising money by any mode or system of taxation. Their lordships think it is impossible to exclude as not within this power the provision imposing a tax by way of license as a condition of the right to fish. It is true that by virtue of section 92, the provincial legislature may impose the obligation to obtain a license in order to raise a revenue for provincial purposes, but this cannot, in their lordships' opinion, derogate from the taxing power of the Dominion parliament to which they have already called attention;'' (see as to No. 3 of section 91, *supra,* pp. 237-8).

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[57] *The Fisheries* case, [1898] A. C. 700.

13. Ferries between a province and British or foreign Country, or between two provinces.

In *In re International and Interprovincial Ferries,*[58] the Supreme Court held, that the Parliament of Canada had authority to, or to authorize the Governor-General in Council to, establish or create ferries between a province and any British or foreign country, or between two provinces, notwithstanding the contention, resting on the decision of Street, J., in *Perry* v. *Clergue,*[59] that a ferry is an incorporeal hereditament, and that the right to grant a ferry is one of the prerogatives of the Crown, and a 'royalty' within the meaning of section 109 of the British North America Act, and, therefore, belonged to the province. At pp. 219-220,[60] Nesbitt, J., with whom Sedgewick and Girouard, JJ., concurred, says: "I do not find any Court has laid down the rule that a mere right to create something, a mere authority to bring into being a corporate entity or privilege, or anything of that character for which a fee could be charged, is a ' royalty ' within section 109, but I would rather place such a right under sections 12 and 108, than under section 109.[61] It seems to me, therefore, that the authority to create a ferry of the character in question is vested in the Dominion, and exercisable under sections 12 and 91 of the British North America Act."

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[58] (1905) 36 S. C. R. 206.

[59] (1903) 5 O. L. R. 357.

[60] See, also, per Nesbitt, J., at p. 213. As to sec. 109 see *infra,* pp. 708-737. The Australian case *Dewar* v. *Smith,* [1900] S. A. L. R. 38, holds that a colonial Governor has not, without express delegation any power to grant a ferry in exercise of the Royal prerogative; referring to which case Mr. Keith in his Responsible Government in the Dominions, Vol. 2, p. 682, says:—'In any case it is clear that the prerogative is not a living one at the present day.'

In *Perry* v. *Clergue,* Street, J., had held that the ownership of river improvements, under section 108, and schedule 3,[61a] does not give the Dominion Government any right to grant a ferry across a river which did not exist apart from them.

14. Currency and coinage.

15. Banking, incorporation of banks, and the issue of paper money.

In *Canadian Pacific R. W. Co.* v. *Ottawa Fire Insurance Co.,*[62] Davies, J., says: " The obvious reason why the incorporation of banks was assigned to the Dominion and not left with the provinces was that the whole subject of banking, and its adjuncts, was being assigned to the Dominion, and if the provinces were allowed to incorporate provincial banks with the rights properly and necessarily belonging to a bank, the whole subject of banking would have been left in inextricable confusion. And so far from having a national banking system to-day of which we are justly proud, we would have a series of systems, some conservative and others more in accordance with what western ideas are popularly supposed to advocate.''

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[61] See Appendix of Statutes, and Orders in Council.

[61a] See *infra,* pp. 689-708.

[62] (1907) 39 S. C. R. at p. 425.

The powers of legislation of the Dominion parliament under this, as under the other enumerated heads of jurisdiction in section 91 of the British North America Act are exclusive; and necessarily imply the right to affect the property and civil rights of individuals in the province so far as is necessary in order to their exercise. And so in *Tennant* v. *The Union Bank of Canada,*[63] the Privy Council held that (inasmuch as warehouse receipts taken by a bank in the course of the business of banking were matters coming within the class of subjects described in section 91 as ' banking, incorporation of banks, and the issue of paper money,'[64] the provisions of the Dominion Banking Acts relating to such warehouse receipts were *intra vires,* though with the effect of modifying civil rights in the province, and conflicting with statutory regulations in Ontario, under provincial Acts, with respect to the form and legal effect in that province of warehouse receipts and other negotiable documents which passed the property of goods without delivery.

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[63] [1894] A. C. 31. *Cf. Merchants Bank* v. *Smith* (1884), 8 S. C. R. 512.

[64] 'Paper money,' they held, necessarily means the creation of a species of personal property, carrying with it rights and privileges which the law of the province did not and could not attach to it, and 'banking,' they held, is an expression wide enough to include everything coming within the legitimate business of a banker.

Provincial legislatures have no right to license private banks. At any rate the Dominion Government has always objected to their so doing. Thus, when in 1905, the Quebec legislature passed an Act as to licenses for private banks, the Minister of Justice, in a report of November 2nd, 1905, says that it appears to him, "that the legislature of Quebec should not provide for the raising of taxes by licenses to private banks, inasmuch as such banks not being authorized by the Bank Act, cannot legally engage in business.[65]

Neither can the provincial legislatures confer banking powers upon other corporations, as for example, upon trust companies. Thus, in a report of November 23rd, 1906,[66] on a Quebec Act to amend the charter of the Imperial Trust Company, the Minister of Justice commented on the provisions authorizing the company to receive money on deposit, and allow interest on the same, and to purchase bills of exchange, and generally do an exchange business with Great Britain and Ireland, British possessions, and foreign countries, saying: "The undersigned does not admit that these powers may be conferred by the legislature. They are not improbably banking powers, which can only be conferred by Parliament." He did not, however, on that account recommend disallowance.

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[65] Provincial Legislation, 1904-1906, p. 25. See in like manner, Hodgins' Provincial Legislation, 1867-1895, at p. 1268; and the report of the Minister of Justice of June 6th, 1901, objecting to two Manitoba statutes which authorized a special tax on every person or firm doing business as a private banker in the City of Brandon, on the ground that the business of private banking is made illegal by Dominion statutes: Provincial Legislation, 1899-1900, p. 86.

[66] Provincial Legislation, 1904-1906, p. 38.

Similar objections were raised by Sir Allen Aylesworth in a report of January 7th, 1910, upon a Quebec Act of 1909, incorporating a company by name 'The General Trust,' and conferring upon it the powers to carry on the business of trustees, money-lending, dealing in property, real and personal, receiving deposits at interest, investing moneys, issuing debentures, etc. He cites the dictum of the Privy Council in *Tennant* v. *The Union Bank,*[67] that 'banking' is "an expression which is large enough to embrace every transaction coming within the legitimate business of a banker." In reply the provincial Attorney-General argued that the powers questioned did not "embrace those transactions which differentiate banking from business of other kinds"; and that "the business of banking, as distinguished from business of other kinds, is the receipt of money from or on account of a customer, to be repaid on demand, or when drawn on by cheque." The Minister of Justice, while adhering to his own view of the matter, did not recommend disallowance; but when, in the following year, the province enlarged the powers of the company by granting authority 'to purchase bills of exchange, and generally do an exchange business with other British countries, and with foreign countries,' the Minister of Justice, by a report of January 12th, 1911, expressed the opinion that these powers "infringed upon the subject of banking under any fair interpretation of the word"; and the provincial Government refusing to amend the Act, he recommended disallowance. The Act, it should be stated, did provide that the company should not lend on the security of bills of exchange or promissory notes. In his report of May 23rd, 1911, recommending disallowance, the Minister says: "The nature of the business of banking is part of the law merchant, and is judicially noticed. If from this business, as so recognized, be excluded the authority to receive money on deposit, to lend money to individuals, except upon the security of bills of exchange, and generally to do an exchange business, the undersigned apprehends that the peculiar business of banking would not only be affected, but very considerably diminished. . The expression 'banking' as used in section 91 of the British North America Act, 1867, is, in the opinion of the undersigned, intended to describe not only such powers as are inherently banking powers, but, also, those which were, under the laws of the provinces at the time of the Union, exercised by the banks in the carrying on of their business, and it includes everything within legitimate banking business as it is practised, or has been developed. It may be seen by reference to pre-Union legislation that the deposit of money at interest, and dealing in exchange were expressly authorized banking transactions in the province. Leading decisions in the United States, also, show that such powers are attributed to the banks in that country. In fact it seems impossible to suppose that these powers are not necessarily common to all well-ordered banking systems."

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[67] [1894] A. C. at p. 46.

The provincial legislatures may impose direct taxes on banks doing business in the province, as was decided by the Privy Council in *Bank of Toronto* v. *Lambe*,[68] and in *Town of Windsor* v. *Commercial Bank of Windsor*,[69] Weatherbe, J., held *intra vires* a provincial Act imposing a tax on the Dominion notes held by a bank as a portion of its cash reserve, under the Dominion Act relating to banks and banking.

So, also, in *Cie de C. F. de la Baie des Chaleurs* v. *Nantel*,[70] Hall, J., says: "The Bank of Montreal or the Bank of Toronto can own real estate in the province for the purpose of its business. The local legislature can make laws which will control such real estate, tax it for local purposes, establish the procedure under which it might be seized and sold upon an unsatisfied judgment against the bank, or for non-payment of taxes, but it could not validly interfere with the manner in which the bank carries on in those premises its business of banking, for the power and franchise in this respect are acquired from Parliament. The local legislature could not legally put in force an Act stipulating that if the bank charged a rate of interest exceeding six per cent. or discontinued business for over 30 days, it should be liable to the appointment of a sequestrator who would take charge of, and continue, and extend its business under the direction and control either of the Executive of the provincial Government, or even of a judge of the Superior Court. And as to banks, in connection with the provincial power to regulate the tenure and conveyance of real estate, *cf.* per Maclennan, J.A., in *Regina* v. *County of Wellington*;[71] none of the other judges, however, adopt the same view in that case.

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[68] (1887) 12 App. Cas. 575.

[69] (1882) 3 R. & S. 420, 427. As to the validity of a provincial Act forbidding the transfer of property till taxes paid, and its applicability to bank shares, see *Heneker* v. *Bank of Montreal* (1895), R. J. Q. 7 S. C. 257.

[70] (1896) M. L. R. 5 Q. B. at p. 71.

The judgment of the Judicial Committee on the pending appeal from the Alberta Courts in the case of *The King* v. *The Royal Bank of Canada,*[71a] has failed to throw fresh light upon the scope of the Dominion power under consideration. The Alberta Courts, however, have held that the provincial legislation in question in that case, does not relate to banking. The following passage from the judgment of Stuart, J., the trial judge, will sufficiently indicate the view taken by them: "It was also contended very earnestly by the defendants that the statute of 1910 is *ultra vires* of the province because it is essentially banking legislation, and is, also, in direct conflict with the provisions of the Bank Act. Let us see what this means. A western province is anxious . . . to encourage the construction of railways within the boundaries of the province. Its legislature incorporates by statute a company giving it power to construct a railway within the province between certain points, and giving it power, also, to issue bonds to a certain amount. By another statute the legislature authorizes the Crown in the right of the province to guarantee these bonds, and in order to insure that the funds raised by the sale of the bonds will be applied to the purpose for which it was intended, and that the railway shall be properly built, the Act provides that the money shall be deposited in a bank to be paid out only in a certain way upon certificate of an engineer appointed by the Crown. The bonds are sold, the money is realized, and is deposited in a bank, as provided by the statute. The bank receives the money with knowledge of all the conditions attached to the deposit, and of the legislation relating to it. Subsequently, before any money is paid out, before any certificate is issued, the legislature, for reasons of public policy which appear good to it, and with which the Court has nothing to do, decides to intervene, and to prevent the further prosecution of the enterprise, and, for that purpose, passes a statute declaring that the money deposited with the bank shall be dealt with in another manner. And it is argued that this is banking legislation, and is inconsistent with the Bank Act. In my opinion this contention is untenable. . To say that monies raised on the security of the province, and intended by the legislature to be devoted by the company whose bonds were secured to the construction of a railway in the province, cannot be diverted by an Act of the legislature to another purpose, because these monies have, for convenience, been deposited in a bank, and because to so divert them is banking legislation or an infringement of the Bank Act, is to state something which appears to me to be utterly unreasonable, and for which no authority cited to me furnishes, as far as I can up to the present moment discern, the slightest foundation."

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[71] (1890) 17 O. A. R. at pp. 449-451. *Cf.* Bourinot's Parliamentary Procedure and Practice, 2nd ed., at pp. 130, 674; and per Dorion, C.J., in *Colonial Building and Investment Association* v. *Attorney-General of the Province of Quebec*, 27 L. C. J. at p. 303. In *Regina* v. *County of Wellington*, 17 O. A. R. at p. 428, Hagarty, C.J.O., and in the same case in the Supreme Court (*sub nom. Quirt* v. *The Queen*), 19 S. C. R. at p. 514, Ritchie, C.J., considered that the Dominion Act there in question, which, reciting the insolvency of the Bank of Upper Canada, provided for its winding-up, as valid under the Dominion power over banking and the incorporation of Banks.

[71a] [1913] A. C. 283. See *infra*, pp. 504-9, for this case.

16. Savings banks.

17. Weights and measures.

In *Re Bread Sales Act,*[72] Meredith, J., expresses the opinion, *obiter,* that an Ontario enactment to the effect that, except as therein excepted, 'no person shall make bread for sale or sell or offer for sale bread except in loaves weighing 24 ounces or 48 ounces avoirdupois,' might be supported under the Dominion power over 'the regulation of trade and commerce,'[73] and 'weights and measures.' But with great respect, it is submitted that this latter power relates merely to the fixing of standard weights and measures.

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[72] (1911), 23 O. L. R. 238, 245. There was a reference to the Court of Appeal as to the interpretation of this Act: (1911), 47 Ch. J. 229.

[73] As to which, see *supra,* pp. 230-6.

18. Bills of exchange and promissory notes.

The mere fact that an Act of a provincial legislature may incidentally touch some of the classes of subjects enumerated in section 91, although, in fact, such subjects are foreign to the purposes of such Act, and not necessarily and directly involved in the legislation, does not make the Act really one within or upon that class of subjects.[74] And so, when the Minister of Justice took exception to an Ontario Act (51 Vict. ch. 70, sec. 23), providing that the railway company therein incorporated might become a party to promissory notes and bills of exchange, and how such notes and bills might be made, accepted, or endorsed so as to be binding on the company, as an infringement on the Dominion power under this sub-section of section 91, Mr. Mowat, the provincial Attorney-General, replied that the Dominion power is " not incompatible with the right of the provincial legislature to confer authority on a corporation to become a party to instruments of this nature as a matter incidental to such corporation. The object of the legislation is not to alter or interfere with the general law in respect to those subjects, but to invest the company with the powers necessary for its due working "; and he refers to the fact that legislation of this nature has for twenty years passed unchallenged as entitled to weight as showing that it is *intra vires*.[75]

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[74] Per Allen, C.J., in *The Queen* v. *City of Fredericton* (1879), 3 P. & B. at p. 187.

[75] Hodgins' Provincial Legislation, 1867-1895, at pp. 212-4. And see *supra*, pp. 215-7.

In like manner in 1887 the Minister of Justice reported that he found a Manitoba Act entitled, 'An Act respecting promissory notes and bills of exchange' to be really an Act respecting evidence, and on that ground recommended that it be left to its operation.[75a]

Lastly, in connection with this Dominion power, we may note the expression of opinion of Taschereau, J., in *Valin* v. *Langlois*,[76] that by virtue of it, and of section 101 of the British North America Act,[77] the Dominion parliament could say that all judicial proceedings on promissory notes and bills of exchange shall be taken before the Exchequer Court or before any other Federal Court. He regards No. 14 of section 92,[78] as having no bearing on the jurisdiction of the Courts in the matters not left to the provincial legislatures.[78a]

19. Interest.

In *Lynch* v. *The Canada North-West Land Company*,[79] the Supreme Court (Gwynne, J., dissenting), held, that 'interest' in this subsection means interest in connection with debts originating in contract; and that this Dominion power does not prevent a provincial legislature, under its authority to legislate with respect to municipal institutions, imposing the addition of a percentage upon all municipal taxes unpaid by a certain date as a penalty for non-payment. "Does not the collocation of No. 19, 'interest,'" says Ritchie, C.J., at p. 212, "with the classes of subjects as numbered 18, 'bills of exchange,' and 20, 'legal tender,' afford a strong indication that the interest referred to was connected in the mind of the legislature with regulations as to the rate of interest in mercantile transactions and other dealings and contracts between individuals, and not with taxation under municipal institutions and matters incident thereto?"[80]

[75a] Hodgins' Provincial Legislation, 1867-1895, at p. 196.

[76] (1879) 3 S. C. R. at p. 74.

[77] See Appendix of Statutes and Orders in Council.

[78] As to which, see *infra*, pp. 525-573. And so per Ritchie, C.J., S. C. 3 S. C. R. at p. 15, and in *Peek* v. *Shields* (1881), 8 S. C. R. at p. 591.

[78a] But see *infra*, pp. 553-5.

[79] (1881) 19 S. C. R. 204, overruling *Morden* v. *South Dufferin* (1890), 6 M. R. 515; *Ross* v. *Torrance* (1879), 2 L. N. 186; *Schultz* v. *City of Winnipeg* (1884), 6 M. R. 40; *Murne* v. *Morrison* (1882), 1 B. C. (pt. 2) 120.

In *Bradburn* v. *Edinburgh Assurance Co.*,[81] Britton, J., held, that R. S. C. 1886, ch. 127, sec. 7, was *intra vires* under the Dominion power over interest. This enacts that when any principal money or interest secured by mortgage of real estate, is not, under the terms of the mortgage, payable till a time more than five years after the date of the mortgage, then, if, at any time after the expiration of such five years, any person liable to pay, or entitled to redeem the mortgage, tenders or pays to the person entitled to receive the money, the amount due for principal money and interest to the time of payment, calculated as in the Act provided, together with three months' further interest in lieu of notice, no further interest shall be chargeable, payable, or recoverable, at any time thereafter on the principal money or interest due under the mortgage.[82] Britton, J., specially refers to *Lynch* v. *Canada North-West Company, supra,* among other cases, and says (at pp. 664-6): "It is argued for the defendants that the right of the Dominion to legislate is only as to rate, as to usury, leaving details and matters affecting contracts to the provinces. On the other hand it is argued by the plaintiffs that the Dominion was intended to have, and has, power to deal with interest as to rate, and, also, when it shall, and when it shall not be payable, even if, in so dealing with it, in concrete instances, there is an apparent interference with property and civil rights. . . . After the best consideration I can give to this matter my conclusion, contrary to first impression, is that section 7 of R. S. C. 1886, ch. 127, is within the competence of the Dominion parliament. In so holding I do not overlook the argument that, as a logical result, the Dominion can legislate to limit any contract to the shortest duration when interest is involved, nor do I overlook the decision in *Citizens Insurance Co.* v. *Parsons,*[83] that 'property and civil rights' in section 92 of the British North America Act, include rights arising from contract . . . and are not limited to such rights only as flow from the law. It is, however, one thing to legislate when the contract has sole reference to security for money lent at interest, and quite a different thing to legislate in reference to other contracts where interest is only an incident."

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[80] See, also, per Patterson, J., S. C. at p. 225; and per Burton, J.A., in *Edgar* v. *The Central Bank* (1888), 15 O. A. R. at p. 202.

[81] (1903) 5 O. L. R. 657.

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[82] A precisely similar enactment is contained in the Ontario statute, R. S. O. 1897, c. 205, s. 25. The Dominion enactment was originally passed in 1880, 43 Vict. c. 42, D.

[83] (1881) 7 App. Cas. 96.

We must await a Privy Council decision, however, for a finally authoritative interpretation of this Dominion power. It would seem that the Minister of Justice himself questioned the validity of the above enactment upon the ground that it related " not to interest, properly speaking, but rather to contracts for the securing of money—clearly a matter of provincial jurisdiction ";[84] which seems to suggest the same distinction as that taken by Dubuc, J., in *Schultz* v. *City of Winnipeg,*[85] when he expresses the view that though by No. 19 of section 91 ' interest ' is exclusively within Dominion jurisdiction, this does not prevent a provincial legislature empowering municipalities to issue debentures bearing interest not exceeding seven per cent., or any other rate, for: " In that case, it only authorizes the corporate body, as an artificial person, to contract for a rate of interest higher than the legal rate. The corporate body is not forced nor bound to pay such rate against its will. It is only allowed to contract for such a rate, if it so desires." And so in *Royal Canadian Insurance Co.* v. *Montreal Warehousing Co.,* [86] Johnson, J., held, that an Act of the Quebec legislature giving a certain company power to borrow money at such rate of interest as might be agreed, was *intra vires,* and did not conflict with the power of "general legislation on the subject of interest," reserved to the Dominion parliament.

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[84] Can. Hans. 1886, p. 440; Bourinot's Parliamentary Procedure and Practice, 2nd ed., at p. 671; Legislative Power in Canada, p. 389, n. 4.

[85] (1884) 6 M. R. at p. 45. See, also, per Gwynne, J., in *Lynch* v. *Canada North-West Land Co.* (1891), 19 S. C. R. at p. 223.

[86] (1880) 3 L. N. at p. 157.

It must be remembered, however, that from the first Dominion legislation as to interest expressly recognized, as enacted in R. S. C. 1886, ch. 127, sec. 1, that 'except as otherwise provided by this or any other Act of the parliament of Canada, any person may stipulate, allow, and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon.'

In a report of October 29th, 1904,[87] the Minister of Justice, referring to a Nova Scotia enactment which provided that where it is sought to recover interest exceeding seven per cent. upon any written instrument, such written instrument shall not be deemed to be evidence of the contract between the parties, expressed the view that it encroached upon the exclusive authority of Parliament with regard to interest, and that it should not be allowed to stand. The provincial Attorney-General replied that it did not in any way undertake or profess to regulate the rate of interest legally chargeable, but only to regulate contracts. *Sed quaere,* whether the enactment does not rather fall under No. 14 of section 92, 'procedure in civil matters' in the Courts.

It may be that the Dominion power as to 'interest' will be ultimately found to be confined to fixing what shall be the legal rate of interest apart from express agreement or express provincial enactment, and the passing of usury laws, restricting the charging of interest throughout the Dominion, or any part thereof.[88]

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[87] Provincial Legislation, 1904-1906, pp. 43-50.

20. Legal tender.

21. Bankruptcy and Insolvency.

It would seem that the only exclusive power which the Dominion parliament possesses under this sub-section in respect to such legislation as is usually resorted to in order to secure a rateable distribution of the assets of a person financially insolvent, is the power of providing for a compulsory process whereby this end may be attained, authorizing, in other words, proceedings *in invitum* against the insolvent. But, provided they base themselves upon a voluntary assignment to a trustee for the general benefit of his creditors previously executed by the insolvent, provincial legislatures have full power, under their jurisdiction over property and civil rights in the province, and procedure in civil matters in the province, to give to such an assignment, once executed, precedence over judgments and executions, and over such subsidiary processes as garnishee orders, attachments, or interpleaders.[88a] While, on the other hand, such latter provisions being properly ancillary to bankruptcy and insolvency legislation, strictly so called, there is nothing to prevent the Dominion parliament including them in a law relating to bankruptcy and insolvency, in which case, of course, the provisions of the Dominion Act would place in abeyance those of the provincial legislation.[89] The above is the effect of the leading decision upon the subject of this sub-section, namely, that of the Privy Council in *Attorney-General for Ontario* v. *Attorney-General for Canada*,[90] where their lordships say, at pp. 200-1: "It is not necessary, in their lordships' opinion, nor would it be expedient to attempt to define what is covered by the words 'bankruptcy' and 'insolvency,' in section 91 of the British North America Act. But it will be seen that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. In reply to a question put by their lordships the learned counsel for the respondent were unable to point to any scheme of bankruptcy or insolvency legislation which did not involve some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent debtor's estate."

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[88] See *supra*, pp. 144-7.

[88a] As pointed out in *Tooke Bros. Limited* v. *Brock and Patterson, Limited* (1907), 3 E. L. R. (N. Br.) 270, 272, it is entirely voluntary on the debtor's part whether he will become liable to the provisions of such a provincial Act or not. But if he does make an assignment under it, whether insolvent or not, his estate will be dealt with as the Act provides, that is, in effect, a manner chosen by the debtor himself as arising out of his voluntary assignment.

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[89] See *supra*, pp. 118-120; 123-127; 191.

[90] [1894] A. C. 189. This decision seems clearly to show that the provincial Acts in question in *Johnson* v. *Poyntz* (1881), 2 R. & G. 193, and in *In re The Wallace Huestis Grey Stone Co.* (1881), Russ. Eq. 461, were rightly held not to be within the Dominion power over bankruptcy and insolvency, the first being an Act providing for the relief of debtors imprisoned on process out of the County Courts, the second an Act to wind up a company on the ground that it was heavily embarrassed and could not extricate itself without having recourse to the double liability of the shareholders; and that *Queen* v. *Chandler* (1868), 1 Hann. 548, was wrongly decided. In this case a provincial Act providing for the discharge of insolvent debtors, after examination, where their inability to pay was shewn, and they had made no fraudulent transfer or undue preference, was held *ultra vires*.

In connection with this Dominion power, Wurtele, J., in *Dupont* v. *La Cie de Moulin a Bardeau Chanfrene,*[91] in the Superior Court, Montreal, quotes words of Mr. Wharton in his Treatise on Private International Law, to the effect that bankruptcy " is a species of national execution against the estate of an insolvent "; and says: " It is in the interest of the trade and commerce of the whole Dominion that there should be one uniform law for all the provinces, regulating proceedings in the case of insolvent debtors, unrestricted in its operation by provincial boundaries; that it should be possible to obtain a national execution, and not merely a limited provincial one against the estate of an insolvent debtor who might hold property in several provinces, or transfer it from his own province into another." Nevertheless, there has been no Dominion Bankruptcy or Insolvency Act since 1880, save as to corporations;[92]

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[91] (1888), 11 L. N. 225. It was here held that the Dominion parliament could under No. 21 legislate for the distribution of the estate of the debtor either with or without a discharge of his liabilities.

[92] See 43 Vict. c. 1, D. The Dominion Winding-up Acts are insolvency legislation, and are properly made applicable to com-

and the provinces have endeavoured to supply the place of one so far as their powers permit, by Acts respecting preferences and assignments for the general benefit of creditors, and Acts for the relief of creditors by doing away with priority among executions.

In the Quebec case just cited, it was held that under this sub-section, the Dominion parliament could legislate for the distribution of the estate of an insolvent debtor either with, or without, a discharge of his liabilities.

In *Crombie* v. *Jackson*,[93] Wilson, J., draws the conclusion that a Dominion Act prescribing a certain order of procedure in respect of claims by and against assignees in insolvency could not be beyond the powers of Parliament under the sub-section we are now considering, "because at the passing of the British North America Act there was a system of proceeding in insolvency in force in the two former provinces of Upper and Lower Canada, very similar to the one established by the Act in question." Thus the suggestion is that in determining the scope of this Dominion power we must have regard to ante-confederation legislation on bankruptcy and insolvency. But the warning of Ritchie, C.J., in *Severn* v. *The Queen*,[94] should certainly be borne in mind, that the British North America Act must not be read by the light of an

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panies incorporated under provincial legislation: *Re Eldorado Union Store Co.* (1886), 6 R. R. 514; *Schoolbred* v. *Clarke* (1890), 17 S. C. R. 265; cited Clement *op. cit.* p. 223, n. 7.

[93] (1874) 34 U. C. R. at p. 580. *Cf.* per Maclennan, J.A., in *Regina* v. *County of Wellington*, 17 O. A. R. at pp. 452-3.

[94] (1878) 2 S. C. R. at p. 99.

Ontario candle alone, without reference to what the law was in other parts of the Dominion.[94a]

The authorities, as they at present exist, have decided the following points as to the Dominion power over bankruptcy and insolvency. In *Allen* v. *Hanson,*[95] it was held, by the Quebec Court of Queen's Bench, that the provision in the Dominion Winding-up Act, making that statute apply to incorporated trading companies 'doing business in Canada, no matter where incorporated' was *intra vires*; and an order granted upon the petition of the liquidator, under a liquidation previously instituted under the Imperial Act of 1862, in Scotland, and as ancillary to that principal winding-up was confirmed; and this decision was affirmed on appeal to the Supreme Court of Canada.[96] For, as Ritchie, C.J., says in the latter Court:—[97] "All the Winding-up Act seeks to do in the case of foreign corporations is to protect and regulate the property in Canada, and protect the rights of creditors of such corporations upon their property in Canada"; and so Strong, J.,[98] distinguishes the prior case of *Merchants Bank of Halifax* v. *Gillespie,*[99] which, as he says, raised the question of the validity of winding-up proceedings under the Dominion statute as the sole and principal winding-up of a company incorporated under the English Act of 1862, and in which the Supreme Court held that an order could not be made, under that statute, for the winding-up of the Steel Company of Canada, a joint stock company incorporated in England in 1874, under the Imperial Joint Stock Companies Act, and never incorporated in Canada, but with its chief place of business in Nova Scotia, where it owned and operated extensive iron mines and iron and steel works, constituting almost its whole assets, while it owned no real estate or premises elsewhere than in Canada, but occupied an office in Great Britain.

[94a] And *cf. supra.*

[95] (1890) 13 L. N. 129, 16 Q. L. R. 78.

[96] (1890) 18 S. C. R. 667.

[97] 18 S. C. R. at p. 673.

[98] *Ibid.* at p. 674.

[99] (1885) 10 S. C. R. 312.

In this latter case, Strong, J., held that if the Dominion Winding-up Act was to be construed as intended to apply to authorize the winding-up order sought, which he held it was not, it would be *ultra vires* as in conflict with the Colonial Laws Validity Act, Imp. 28-29 Vict. ch. 63, sec. 2, above referred to,[100] inasmuch as it would then be repugnant to an Imperial statute within the meaning of that section, for, he said, the company was " subject to an express statutory provision for its winding-up in the appropriate forum of its domicile, namely, the Imperial Act of 1862, under which the company was organized and winding-up is provided for." But, he added, that he did not intend " to impugn the power of the legislature to enact bankruptcy and insolvency statutes applying to foreign corporations, or even to provide for the winding-up of such corporations, provided in the case of the latter, the statutory provision is express, and does not conflict with any Imperial legislation.'"[101] He, indeed, speaks, in this passage, as though he held that the Dominion Act was not intended to apply at all to companies incorporated under the Imperial Joint Stock Companies Act, as does, also, Ritchie, C.J., in this case; but their subsequent judgments in *Allen* v. *Hanson,*[102] show very clearly that what they mean is that the Dominion Act was not intended to authorize the making of an original winding-up order against such a corporation; and so, in the last named case, Strong, J., says,[103] that he adheres to what he said in *Merchants Bank of Halifax* v. *Gillespie,*[104] "as applicable to the principal and original winding-up of such a company, to which case my opinion was intended to apply, and alone did apply."

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[100] *Supra*, pp. 53-4.

And the *Merchants Bank of Halifax* v. *Gillespie* was again distinguished in *Re Briton Medical Life Association,*[105] where it was held by Proudfoot, J., that the Dominion Acts requiring foreign insurance companies doing business in Canada to make a certain deposit with the Minister of Finance were *intra vires*; and an order was then made, on petition, for the distribution of the deposit made by the English company in question among the Canadian policyholders, notwithstanding that proceedings to wind up the company were pending before the English Courts, Proudfoot, J., observing with reference to *Merchants Bank of Halifax* v. *Gillespie,* that in that case there was no question of a deposit, and what was sought was, not the distribution of the deposit, but the general winding-up of the company.

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[101] *Cf.* per Henry, J., S. C. 10 S. C. R. at p. 334; and see Lindley's Law of Companies, 6th ed., at pp. 840, 1225.

[102] (1890) 18 S. C. R. 667.

[103] *Ibid.* at p. 674.

[104] (1885) 10 S. C. R. 312.

[105] (1886) 12 O. R. at pp. 447-8.

In *Re Clark* v. *Union Fire Insurance Co.,*[106] Boyd, C., held the Dominion Winding-up Act *intra vires* of the Dominion parliament, as in the nature of an insolvency law; and that it applied to all corporate bodies of the nature mentioned in it all over the Dominion, and that the company there in question, though incorporated under a provincial charter, was subject to its provisions: and he observes (at p. 620):—" The case in the Supreme Court of *Merchants Bank* v. *Gillespie,*[107] does not touch the status of the present company, which is a domestic corporation within the territorial limits of Canada, whereas the company then in question was for the purposes of the Act a foreign one domiciled in England."

In *Quirt* v. *The Queen,*[108] the Supreme Court decided that, by virtue of its power to make laws in relation to bankruptcy and insolvency, Parliament can provide for the winding-up in insolvency of a single institution, holding *intra vires,* as an Act in relation to bankruptcy and insolvency, a Dominion Act, which, reciting the insolvency of the Bank of Upper Canada, provided for its winding-up, and for a fair and equitable adjustment and settlement of the claims of all creditors. Strong, J., expresses himself, in this case,[109] as considering the Privy Council as indicating in *L'Union St. Jacques de Montreal* v. *Belisle,*[110] " that a special statute, providing for the winding-up of an incorporated company, would be bankruptcy or insolvency legislation "; while Patterson, J.A., with whom Taschereau, J., concurs, expresses himself in like manner.[111] Maclennan, J.A., however, upholds,[112] the dissentient view that " the power of legislation over bankruptcy or insolvency, which was intended to be conferred on the Dominion parliament, was the same as had been exercised by the Imperial parliament and by the provincial legislatures before Confederation, namely, the passing of laws more or less general in their application, with proper Courts and procedure and machinery for carrying them into effect, and not Acts declaring a particular person, or firm, or corporation bankrupt or insolvent, or putting their affairs into a course of liquidation." Legislation of the latter kind, he holds, was " intended to be given to the legislatures of the provinces, as matters of property and civil rights, and matters of a merely local and private nature." [112a]

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[106] (1887) 14 O. R. 618; affirmed, 16 O. A. R. 161; and, also, in the Supreme Court, *sub nom. Schoolbred* v. *Clarke* (1890), 17 S. C. R. 265.

[107] (1885) 10 S. C. R. 312.

[108] (1891) 19 S. C. R. 510, affirming the decisions of the Courts below reported *sub nom. Regina* v. *County of Wellington,* 17 O. R. 615, 17 O. A. R. 421.

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[109] 19 S. C. R. at p. 517.

[110] (1874) L. R. 6 P. C. at p. 36.

[111] 19 S. C. R. at pp. 521-2. And *cf.* per Street, J., S. C. 17 O. R. at p. 618; per Osler, J.A., S. C. 17 O. A. R. at p. 443; and Legislative Power in Canada, at pp. 568-571.

[112] S. C. 17 O. A. R. at pp. 452-3.

[112a] And see *supra*, pp. 140-3; and *infra*, pp. 627-9.

In *Cushing* v. *Dupuy,*[113] the Privy Council held that, by necessary implication, the Imperial Act in assigning to the Dominion parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the provinces, so far as a general law relating to these subjects might affect them; and overruled the contention that the parliament of Canada could not take away the right to appeal to the Queen from final judgments of the Court of Queen's Bench under the Insolvent Act, because this was part of the procedure in civil matters exclusively assigned to the legislature of the province. And so in the *Thrasher Case,*[114] Crease, J., says: " In the great majority of Dominion Acts there are provisions not only vesting jurisdiction in the Courts of the province, but, also, regulating in many instances and particulars the procedure in such matters in those Courts, *e.g.*, customs, inland revenue, public works, banks and banking, trade-marks, fisheries, public lands, inspection of staples, aliens and naturalization, patents, insolvency, and a host of others."

There can be no doubt of the correctness of Burton, J.A.'s dictum in *Hodge* v. *The Queen,*[115] that, although the provinces have exclusive power under No. 14 of section 92, to make laws in relation to the administration of justice in the province, including the constitution, maintenance and organization of provincial Courts, both of civil and criminal jurisdiction, when we find bankruptcy and insolvency mentioned as a subject for the exclusive jurisdiction of the Dominion, we must necessarily understand that the organization of an insolvent Court, and administration of justice and proceedings connected with insolvency, are excepted from the general words of that sub-section.[116] It is not so easy to agree that, as a matter of legislative power, the Dominion parliament could not enact that all proceedings under the Insolvent Act—or all actions on bills of exchange and promissory notes —should be taken in one provincial Court only, say, for example, in Ontario, in the Division Courts.[117] But there, of course, is no doubt as to the power of the Dominion parliament to impose new jurisdiction in bankruptcy and insolvency upon provincial Courts.[118]

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[113] (1880) 5 App. Cas. 409. *Cf. Attorney-General of Ontario* v. *Attorney-General of Canada,* [1894] A. C. 189. For Canadian decisions and dicta illustrating the same point, see Legislative Power in Canada, at pp. 439-442.

[114] (1882) 1 B. C. (Irving), at p. 208.

[115] (1882) 7 O. A. R. at p. 274.

The circumstance that the Dominion parliament may not, in fact, have exercised its power of legislating in relation to bankruptcy and insolvency, does not give provincial legislatures the right to legislate thereon;[119] but this does not prevent the latter dealing incidentally, in their legislation, with assignees in insolvency,[120] or with insolvent debtors, as, for example, by defining the conditions under which a writ of *capias* can be obtained, though, in some cases, applicable only to insolvent traders;[121] or even, as already stated, by making all such provisions for securing a rateable distribution of the assets of an insolvent among his creditors by superseding executions, or attachments, or garnishee orders, as would be proper to bankruptcy and insolvency legislation properly so called, provided such provisions are based upon an assignment for the general benefit of his creditors, first executed, voluntarily, by the insolvent.[122]

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[116] *Cf.* per Taschereau, J., in *Valin* v. *Langlois* (1879), 3 S. C. R. at p. 76, where he says that he reads No. 14 of section 92 of the British North America Act "as having no bearing on the jurisdiction of the Courts in the matters not left to the provincial legislature." See, however, *infra*, pp. 553-5.

[117] *Cf.* for dicta to the effect that they could not, per Wilson, J., in *Crombie* v. *Jackson* (1874), 34 U. C. R. at pp. 579-580; per Thompson, J., in *Pineo* v. *Gavaza* (1885), 6 R. & G. (18 N. S.), at p. 489. See, also, *supra*, p. 166.

[118] See *supra*, pp. 148-151; also, Legislative Power in Canada, pp. 511-517; *Attorney-General of Canada* v. *Sam Chak* (1909), 44 N. S. 19; *In re Henry Vancini* (1904), 34 S. C. R. 621; *Geller* v. *Loughrin* (1911), 24 O. L. R. 18, at pp. 25, 33.

In *Baie des Chaleurs R. W. Co.* v. *Nantel,*[123] the Quebec Court of Queen's Bench held that a provincial statute which provided for the sequestration of the property of a railway company subsidized by the province, when such company was insolvent, and that the sequestrator should take possession and perform all acts necessary for the construction, maintenance, administration and working of the railway, and that if he had not the means at his disposal for that, the Court might order the sheriff to seize and sell the road and its rolling stock—applied, and was *intra vires* as applying, to a Dominion railway company, the majority of the Court holding the Act merely one of procedure in order to obtain a judicial sale, and that its provisions were accessory to this end, Pagnuelo, J., the judge of first instance, whose decision was affirmed, observing that if there were a Dominion law providing for the liquidation of such insolvent railways, the provincial legislature could not interfere, but that there was no such law. But in his report of November 11th, 1899,[124] upon a certain Quebec Act, the Minister of Justice observes: " It is, in the opinion of the undersigned, clearly incompetent to a provincial legislature to provide for the sequestration or sale of a company's property, or the winding-up of the affairs of the company by reason of the company's insolvency. The subject of bankruptcy and insolvency is specially enumerated as one within the exclusive authority of Parliament, and it is undoubted that subjects within the exclusive authority of Parliament are not within the authority of a legislature."

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[119] See *supra*, p. 130; and per Osler, J.A., in *Clarkson* v. *Ontario Bank* (1888), 15 O. A. R. at p. 191.

[120] *In re De Veber* (1882), 21 N. B. at pp. 398-9 and 425.

[121] *Parent* v. *Trudel* (1887), 13 Q. L. R. at p. 139; and *cf. In re Killam* (1878), 14 C. L. J. N. S. at pp. 242-3.

[122] *Supra*, pp. 279-281.

[123] (1896) R. J. Q. 9 S. C. 47, 5 Q. B. 65.

The decision of Armour, C.J., in *In re Dominion Provident Benevolent and Endowment Association,*[125] and some remarks of his in the course of the argument in that case, might seem to suggest the view that provincial legislatures might provide for the winding-up on insolvency of companies which they have themselves incorporated. But in *Re Iron Clay Brick Manufacturing Co.,*[126] Robertson, J., held that the Ontario Joint Stock Companies Winding-up Act had no application in a case where a winding-up was sought by a creditor on the ground that the company was insolvent, the provincial legislature having no jurisdiction in matters of insolvency; and in a report of January 8th, 1904,[127] the Minister of Justice objected to a Quebec Act respecting the liquidation of non-commercial companies and corporations, and which provided that such companies or corporations as had ceased payment might be placed in liquidation on the application of any unsecured creditor, that such legislation appeared to him to partake of the quality of bankruptcy and insolvency, and to be for that reason objectionable. There would seem, however, no objection to provincial legislation providing for the liquidation of the affairs of companies, under special circumstances, and irrespective of whether they be insolvent or not.[128]

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[124] Provincial Legislation, 1899-1900, at p. 49.

[125] (1894) 25 O. R. 619, see at p. 620; and Legislative Power in Canada, p. 457, n. 2.

Finally, as already pointed out, Dominion legislation in relation to bankruptcy and insolvency may properly contain ancillary provisions dealing with matters which would otherwise be within the legislative competence of the provincial legislatures; and then provincial legislatures would be precluded from interfering, and any existing provincial enactments which did conflict would be superseded by the Dominion Act.[129]

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[126] (1889) 19 O. R. at pp. 199-120. On the other hand, as to the Dominion Winding-up Act only applying where there is insolvency, since otherwise it would be *ultra vires*, see *Re Cramp Steel Co. Limited* (1908), 16 O. L. R. 230.

[127] Provincial Legislation, 1901-3, p. 27.

[128] *McClanaghan* v. *St. Ann's Mutual Building Society* (1880). 24 L. C. J. 162, and *cf. L'Union St. Jacques de Montreal* v. *Belisle* (1874), L. R. 6 P. C. 31.

22. Patents of invention and discovery.

In entire accordance with what has been just stated in reference to the Dominion power over bankruptcy and insolvency,[130] Osler, J.A., decided in *In re Bell Telephone Co.,*[131] that section 28 of the Dominion Patent Act of 1872, which, after specifying certain cases in which patents are to be null and void, provided that in case dispute should arise under that section, such disputes should be settled by the Minister of Agriculture, or his deputy, whose decision should be final, was *intra vires.* "For," he observes, "though property and a civil right, it" (*sc.* the patent), "is yet one of parliamentary creation; and I see no reason why the same power which gives it birth and limits the term of its existence, should not, also, as a matter of policy, and for the purpose of effectual legislation on the subject, provide a special mode of enquiring into and deciding upon the question whether the conditions upon which it was granted, to which it is expressed to be subject, and on which its existence depends, have been complied with." This decision, however, may be justified not only on the principle that the Dominion parliament has power, by necessary implication, to regulate matters of procedure in relation to the subjects enumerated in section 91 of the British North America Act; but, also, on the principle illustrated and acted upon in the cases of *Aitcheson* v. *Mann,*[132] *Wilson* v. *Codyre,*[133] and *Flick* v. *Brisbin,*[134] namely, that, in conferring some benefit or creating some right the Dominion parliament may impose as a condition upon those who avail themselves of that benefit, or that right, something which it would be *ultra vires* for it to enact otherwise. The first of these held, *intra vires,* on this latter principle, section 24 of the Patent Act of 1872, which required holders of patents under that Act, in the event of their rights being invaded, to litigate the matter in that Court the place of holding which should be closest to the place of residence, or of business of the defendant. See per Boyd, C., at p. 254.[134a]

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[129] *Attorney-General of Ontario* v. *Attorney-General of Canada,* [1894] A. C. 189; *In re Killam* (1878), 14 C. L. J. N. S. at pp. 242-3.

[130] *Supra,* p. 288-9.

[131] (1884) 7 O. R. 605, at p. 612. See per Henry, J., in *Smith* v. *Goldie* (1882), 9 S. C. R. at pp. 68-69; per Ritchie, C.J., in *Valin* v. *Langlois* (1879), 3 S. C. R. at pp. 23-4. See also, *supra,* p. 274.

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[132] (1882-3) 9 P. R. 253, 473.

[133] (1886) 26 N. B. 516.

[134] (1895) 26 O. R. 423. This case, and *Wilson* v. *Codyre*, held *intra vires* sections of the Criminal Code giving one who is assaulted the option to proceed by complaint in a summary way before a magistrate, but providing that, if he elects to take his remedy by this method, and if the defendant obtains a certificate of the Justice that the cause against him is dismissed, or that he has paid the penalty or suffered the imprisonment awarded, the plaintiff loses his right of action in respect of the same assault in order to recover damages as a civil wrong. And see for a like principle applied to provincial legislatures: *Kerley* v. *London and Lake Erie Transportation Co.* (1912) 26 O. L. R. 588. Reversed on appeal, but not on this point, May 5th, 1913. (See Vol. 28, O. L. R.

[134a] As to whether the provincial Attorney-General, or the Attorney-General for Canada is the proper person to institute proceedings in the nature of a *scire facias* to set aside a patent of invention, see *Reg.* v. *Pattee* (1871), 5 O. P. R. 292; *Mousseau* v. *Bate* (1883), 27 L. C. J. 153; cited Clement *op. cit.* pp. 292-3.

23. Copyrights.

The intendment of this sub-section is "to place the right of dealing with colonial copyright within the Dominion under the exclusive control of the parliament of Canada, as distinguished from the provincial legislatures";[135] but it in no way interferes with the power of the Imperial parliament to legislate for the whole Empire in respect to copyright by statutory provisions made expressly applicable to every part of the British Dominion:[136] nor did it exempt Canada from the binding force of such Imperial legislation unrepealed at the time of Confederation.[137] On January 5th, 1889, the law officers of the Crown in England advised that, in their opinion, the then existing powers of colonial legislatures to pass local laws on the subject of copyright in books were probably limited to en-

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See, also, *infra*, p. 297; *supra*, p. 25, n.; and *Attorney-General of Canada* v. *Ewen* (1895), 3 B. C. 468.

[135] *Smiles* v. *Bedford* (1876), 23 Gr. 590, 1 O. A. R. 436. See per Burton, J.A., 1 O. A. R. at p. 443; per Moss, J.A., *ibid.*, at pp. 447-8. See, also, *Anglo-Canadian Music Publishers' Association* v. *Suckling* (1889), 17 O. R. 239; *Black* v. *Imperial Book Co.* (1903), 5 O. L. R. 184.

[136] See *supra*, pp. 51-3, 56. And so in *Hubert* v. *Mary* (1906), R. J. Q. 15 K. B. 381, it was held that the Imperial International Copyright Act, 1886, extends to the whole of the British Dominions, and is, therefore, in force in Canada; and, that the Imperial parliament can legislate in matters of copyright over the head of the Dominion parliament.

[137] See, on whole subject, Legislative Power in Canada, pp. 222-231. What is there stated may be supplemented by a reference to the speech of Mr. Sydney Buxton in introducing the Imperial Copyright Bill, 1911, into the House of Commons, on July 26th, 1910; and the Memorandum of the Proceedings of the Imperial Copyright Conference, 1910, presented to the Imperial Parliament in July, 1910 (Dominions No. 3). See, also, an Article on Canadian Copyright in its Constitutional and International Aspects, by A. R. Clute (1904), 24 C. L. J. 307, 347.

actments for registration, and for the imposition of penalties with a view to the more effectual prevention of piracy, and to enactments within sub-section 4 of section 8 of the International Copyright Act, 1886, with reference to works first produced in a colony.[138]

24. Indians and lands reserved for the Indians.

As the Privy Council state in *St. Catherines Milling and Lumber Co.* v. *The Queen*:—[139] "The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the parliament of the Dominions is not in the least degree inconsistent with the right of the provinces to the beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title"; and the general subject of Indian lands will be found discussed in Chapter XXIX., where property under the British North America Act is dealt with.[139a]

Lands surrendered by Indians to the Crown, though for a consideration in the nature of an annuity by way of interest accruing from the proceeds of the sale of the lands, do not come within this sub-section 24, of section 91, as 'lands reserved for Indians'; but, on such surrender, become ordinary unpatented lands, and upon being sold to private purchasers are liable to assessment under provincial Acts, even before patent granted.[140] But where a tribe of Indians was entitled to enjoy the constituted rents of a certain seigniory, it was held by the Court of Queen's Bench, at Montreal, that, though the naked property, or naked right of ownership of the constituted rents, was vested in the Crown as represented by the province of Quebec, that province held them subject to the usufruct or enjoyment of the Indians, being an interest other than the province in the same within the meaning of section 109 of the British North America Act;[141] and that it pertained to the Dominion Government to sue for and collect the arrears of such rents, that Government being entrusted with the administration of the affairs and property of Indians in Canada, the power to legislate on a subject necessarily implying a right of administration respecting the matter of such subject: for that the Privy Council had now held in the *Indian Claims* case,[142] that the enumeration of the subjects contained in sections 91 and 92 of the British North America Act, not only confers legislative power, but also defines the governmental powers and functions of the various Governments.[143]

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[138] Dom. Sess. Pap. 1894, No. 50, p. 7.

[139] (1888) 14 App. Cas. 46, at p. 59. And see per Patterson, J.A., S. C. 13 O. A. R. at p. 170.

[139a] See *infra*, pp. 710-721.

In *Ontario Mining Co.* v. *Seybold,*[144] the Privy Council followed their previous decisions in *St. Catherines Milling Co.* v. *The Queen,*[145] and held that lands in Ontario surrendered by the Indians by treaty, belong in full beneficial interest to the Crown as representing the province, subject only to any privileges of the Indians reserved by the treaty; and that the Crown can only dispose thereof on the advice of the Ministers of the province, and under the seal of the province; and that it was *ultra vires* of the Dominion to appropriate, without the consent of the province, part of the surrendered lands under its own seal as a Reserve for the Indians in accordance with the provisions of the treaty; for that, although the Dominion had, by section 91 of the British North America Act, exclusive legislative authority over the lands in question, it had no proprietary interest therein. Their lordships agreed with the Court below that all this was a corollary from the *St. Catherines Milling Co.* case. They say, at p. 82: "Let it be assumed that the Government of the province, taking advantage of the surrender . . . came at least under an honourable engagement to fulfil the terms on the faith of which the surrender was made, and, therefore, to concur with the Dominion Government in appropriating certain undefined portions of the surrendered lands as Indian Reserves. The result, however, is that the choice and location of the lands to be so appropriated could only be effectively made by the joint action of the two Governments." Thus their lordships did not uphold the distinction strenuously contended for by Gwynne, J., in his judgment in the Supreme Court,[146] that lands reserved by treaty with the Indians and retained by the Crown (*sc.* as representing the Dominion) upon a trust accepted by the Crown for the exclusive benefit of the Indians are in a different position to that of the lands under consideration in the *St. Catherines Milling Company* case, which were lands surrendered by the North-West Angle Treaty, unaffected by any trust or interest therein reserved for the Indians.

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[140] *Church* v. *Fenton* (1880), 28 C. P. 384, 4 O. A. R. 159, 5 S. C. R. 239.

[141] See Appendix of Statutes and Orders in Council.

[142] [1897] A. C. 199.

[143] *Mowat* v. *Casgrain* (1896), R. J. Q. 6 Q. B. 12.

[144] [1903] A. C. 73, 32 S. C. R. 1, 32 O. R. 301, 31 O. R. 386.

[145] (1888) 14 App. Cas. 46.

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[146] 32 S. C. R. at p. 22.

In a previous judgment in a case of *Caldwell* v. *Fraser,* unreported, but printed in McPherson and Clark's Law of Mines, pp. 15-24, on January 31st, 1898, Rose, J., had said that: " As there was no power in the Indians to sell or transfer their interest in the land, but only to surrender their right to the Crown by formal contract, no act of theirs could confer on either the Dominion or the province the power of sale; and that the right and power of sale must be found to exist independently of any act or treaty:" also, that " there was not vested in the province the right to sell the lands or interfere with the Indians until after a formal surrender of the lands to the Crown:" also, that " the parliament of Canada could not have given the Indians power to sell to a stranger, nor could it, by legislation, have validly asserted the right to sell the lands;" and " any surrender or cession by the Indians of their lands or their rights, left the power of sale exactly where it was prior to such surrender or cession. That power, I think, was in the province, subject to the surrender or other extinguishment of the Indian title." He further held, that, although in a surrender or release by the Indians to the Crown, the *habendum* in such release was in trust to sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada might deem most conducive to the welfare of the Indians, the power of sale, nevertheless, did not rest in the Dominion, although the surrender was none the less effective. He further observes that: " Since the decision in the *St. Catherines Milling Company* case, the Dominion has not assumed to sell unsurrendered Indian lands."

Rose, J., further points out in this judgment that the legislation contained in 54-55 Vict. ch. 5, D., and 54 Vict. ch. 3, O., and the agreement entered into pursuant to their provisions between the Dominion and the province, extinguishing the rights of hunting and fishing by the Indians throughout the tract surrendered, " serve as a declaration by both legislatures that the right exists in the Dominion to extinguish the Indian title by legislation." In *St. Catherines Milling and Lumber Co.* v. *The Queen,*[147] on the other hand, Burton, J.A., had expressed the opinion that the provincial authorities undoubtedly have the power to extinguish the Indian title.

The land in question in *Ontario Mining Co.* v. *Seybold,* referred to above, was part of Sultana Island, a grant of which, by the Dominion, was declared void by Rose, J., in *Caldwell* v. *Fraser;* and in his judgment in the former case, Boyd, C., says,[148]: " My conclusion in the matter of title is in accord with the opinion of Mr. Justice Rose, as expressed in the unreported case of *Caldwell* v. *Fraser,* and is not at variance with the judgment of the Court of Queen's Bench in *Attorney-General of Canada* v. *Attorney-General of Quebec.*"[149]

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[147] (1886) 13 O. A. R. at p. 167.

[148] (1899) 31 O. R. at p. 400.

The further point presents itself whether the legislative power of the provinces over lands when divested of the Indian title is controlled and limited by the provisions of any treaties made with the Indians at the time of their surrender. But however this may be, the Dominion Government would doubtless, in all cases, protect the rights of the Indians under such treaties by exercise of its veto power, as it did in the case of an Ordinance of the North-West Territories of 1889, which assumed to restrict rights of hunting contrary to such treaties;[150] and so, on similar grounds, a British Columbia Act of 1874, relating to Crown lands in the province, but making no reservations for the Indian tribes, was disallowed.[151]

There is, of course, nothing in this Dominion power over Indians to debar provincial legislatures enacting that Indians shall not exercise the provincial franchise.[152]

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[149] (1897) R. J. Q. 6 Q. B. 12, *alias Mowat* v. *Casgrain*, under which name it is referred to *supra*, p. 297.

[150] Hodgins' Provincial Legislation, 1867-1895, at pp. 1254-6.

[151] *Ibid.*, at pp. 1024-8, *q.v.* on the general subject of the Indian title. And as to what may be called the Indian Treaty Indemnity case, *Dominion of Canada* v. *Province of Ontario* [1910] A. C. 637, see *infra*, p. 714.

[152] *Cunningham* v. *Tomey Homma*, [1903] A. C. 151.

In *Rex* v. *Hill,*[152a] a question of a different character arose. It was there held that an unenfranchised treaty Indian, residing on a Reserve, was rightly convicted for having practiced medicine for hire in Ontario, but not upon the Reserve, without being registered pursuant to the provisions of the Ontario Medical Act, on the principle that, though the Dominion parliament may remove an Indian from the scope of the provincial laws to a greater or less extent, yet to the extent to which it had not done so, as in this case, an Indian must in his dealings outside the Reserve govern himself by the general law which applies there. Maclaren, J.A., says (p. 411):—"This claim is made on the broad ground that because section 91 of the British North America Act gives to the Dominion parliament exclusive legislative authority over 'Indians and lands reserved for Indians,' no provincial legislation can affect Indians or Indian lands. . . Let us see where such an interpretation of the British North America Act would land us. By sub-section 7 of section 91 the Dominion is given exclusive authority to legislate respecting the 'Militia.' It would be somewhat startling to hear it gravely argued that no legislation of the province can apply to or affect militiamen. By sub-section 25 the subject of 'Aliens' is assigned exclusively to the Dominion. According to the argument on this appeal, no provincial legislation applies to an alien. A militiaman, or an alien, or a member of any of the other classes mentioned in section 91, may violate any provincial law without incurring any penalty, and cannot avail himself of any benefit or advantage conferred by provincial legislation." It may, also, be noted that, at p. 410, Osler, J.A., uses very broad language as to the possible power of the Dominion parliament to remove Indians from the scope of provincial laws. He says:— "Parliament may, I suppose, remove him (*sc.* an Indian) from their scope." But Meredith, J.A., suggests a qualification (p. 414): "That enactment" (*sc.* the Ontario Medical Act) "is not one respecting Indians, or lands reserved for Indians . . . and if it be considered inapplicable to Indian bands or Indian lands, it is difficult to perceive how it even overlaps the exclusive field of federal legislative authority. The right to legislate exclusively as to Indians and Indian lands cannot give the power to confer on Indians all or any provincial rights which are within the exclusive authority of the province. It is not needful to say what would have been the result if the defendant had confined his practice to the Indians, nor is such a question open to consideration in such a case as this."

[152a] (1907), 15 O. L. R. 406.

25. Naturalization and aliens.[152b]

In *Cunningham* v. *Tomey Homma,*[153] the Privy Council say that this sub-section of section 91 of the British North America Act " does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other; but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality." Their lordships, therefore, refused to hold that a British Columbia Act which enacted that no Japanese, whether naturalized or not, should have his name placed on the register of voters, or be entitled to vote at the elections for the provincial legislature, was *ultra vires.* They, apparently, placed the Act in question under No. 1 of section 92, whereby the Constitution of the province, and any amendment of it, are placed under the exclusive control of the provincial legislature; and they add that it might with equal force, have been argued that, because No. 24 of section 91 gives

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[152b] It would seem that the status of individuals resident in the colonies must be determined by the law of England, but the rights and liabilities incidental to such status must be determined by the laws of the colony: *In re Adam* (1837) 1 Mo. P. C. 460; *Donegani* v. *Donegani* (1835) 3 Kn. at p. 85; *Regina* v. *Brierly* (1887), 14 O. R. at p. 533. The status in question in the first two cases was that of an alien. As to the power of the Dominion parliament to legislate for the expulsion of aliens,

[153] [1903] A. C. 151.

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see *Attorney-General of Canada* v. *Cain*, [1906] A. C. 542; and an Article by W. Martin Griffin (1899), 33 Amer. Law Rev. 90; also an article on the Exclusion and Deportation of Aliens (1905) 25 C. L. T. 487; also the Australian cases *Robtelmes* v. *Brenan*, [1906] 4 C. L. R. 395; *McKelvey* v. *Meagher*, [1906] *ibid.* p. 265; and an Article on the Legal Interpretation of the Constitution of the Commonwealth, by A. B. Keith, in Jl. of Compar. Legisl. N. S. Vol. 11, pp. 235-8. As to the power of a provincial legislature to provide for the deportation of alien insane paupers, see Hodgins' Prov. Legislation, 1867-95, p. 1325.

the Dominion parliament exclusive legislative authority over Indians, and lands reserved for the Indians, therefore, a provincial legislature had no right to provide that Indians should not exercise the provincial franchise.

In the Court below,[154] the British Columbia judges had considered themselves bound to decide against the validity of the Act in question in consequence of the previous judgment of the Judicial Committee in *Union Colliery Co. of British Columbia* v. *Bryden.*[155] But, although their lordships do, in the latter case, observe that the subject of naturalization seems *prima facie* to include the power of enacting what shall be the consequences of naturalization, they expressly guard themselves against being supposed to be defining the precise meaning of ' naturalization ' in the clause under consideration. At p. 586 of their judgment they say: " Every alien when naturalized in Canada becomes, *ipso facto,* a Canadian subject of the Queen; and his children are not aliens requiring to be naturalized, but are natural born Canadians. It can hardly have been intended to give the Dominion parliament the exclusive right to legislate for the latter class of persons resident in Canada; but section 91, sub-section 25, might properly be construed as conferring that power in the case of naturalized aliens after naturalization. The subject ' naturalization ' seems, *prima facie,* to include the power of enacting what shall be the consequences of naturalization, or, in other words, what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized. It does not appear to their lordships to be necessary, in the present case, to consider the precise meaning which the term ' naturalization ' was intended to bear, as it occurs in section 91, sub-section 25.''

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[154] 7 B. C. 368, 8 B. C. 76.

[155] [1899] A. C. 580.

In the *Union Colliery Company* case, the immediate question before the Board was whether the provisions of section 4 of the British Columbia Coal Mines Regulation Act, as amended in 1890, which prohibited Chinamen of full age from employment in underground coal workings was, or was not, *ultra vires* of the provincial legislature. They decide them to be *ultra vires*,[156] upon the following grounds:— " They (*sc.* the provisions in question) may be regarded as merely establishing a regulation applicable to the working of underground coal mines; and, if that were an exhaustive description of the substance of the enactments it would be difficult to dispute that they were within the competency of the provincial legislatures, by virtue either of section 92, subs. 10, or section 92, subs. 13. But the leading feature of the enactments consists in this, that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects; and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the province of British Columbia. Their lordships see no reason to doubt that, by virtue of section 91, subsection 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are, also, of opinion that the whole pith and substance of the enactments of section 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consist in establishing a statutory prohibition which affects aliens or naturalized subjects, and, therefore, trench upon the exclusive authority of the parliament of Canada."

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[156] The Supreme Court of British Columbia had previously decided the point the other way: *In re Coal Mines Regulation Amendment Act*, 1890 (1896), 5 B. C. 306.

And in *Cunningham* v. *Tomey Homma*,[157] their lordships themselves refer to this previous decision of the Board in *Union Colliery Co.* v. *Bryden,* and distinguish it thus: " This Board dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were, in truth, devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia, and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province. It is obvious that such a decision can have no relation to the question whether any naturalized person has an inherent right to the suffrage within the province in which he resides."

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[157] [1903] A. C. at p. 157.

The net result, therefore, of these two Privy Council decisions seems to be, that provincial legislatures cannot legislate against aliens, whether before or after naturalization, merely as such aliens, so as to deprive them of the ordinary rights of the inhabitants of the province; although they might so legislate against them as possessing this or that personal characteristic or habit, which disqualifies them from being permitted to engage in certain occupations, or enjoy certain rights generally enjoyed by other people in the province. The Dominion parliament alone can legislate in relation to them merely as aliens. But it is a different matter when rights and privileges which have to be specially conferred are in question, such as the right to exercise the franchise. It is within the power of provincial legislatures to refuse to confer such rights upon aliens or any other class of people in the province; and especially is this clear in the case of the legislative franchise, for the qualifications for the exercise of that are an integral part of the Constitution of the province, which by No. 1 of section 92 is expressly assigned exclusively to the provincial legislature.

In other words, their lordships appear to have accepted the view submitted by Mr. Christopher Robinson, K.C., of counsel for the appellant, on the argument in the *Tomey Homma* case,[158]: " There is just this essential and leading distinction between *Bryden's* case and this, that every person, unless prohibited, has the right to work, that is to say, he requires to ask leave to do so from no one, but no person can vote unless the right is conferred upon him by the proper authority." And Lord Watson, in the course of the same argument, is reported to have put the point of distinction thus,[159]: "I can understand it being said that the provincial legislature had no jurisdiction to enact a special enactment prohibiting an alien from doing something which otherwise he would be entitled to do; but it is a different thing when you say that the provincial legislature is bound to enable the alien to do something which *prima facie* he has not the right to do." And, in further illustration and support of the view here taken, the words of Mr. Edward Blake, as counsel for the respondent, on the same argument, are worth repeating,[160]:—"As I submit their lordships did not decide (in the *Union Colliery Co.* case), that it would not be quite possible for a provincial legislature incidentally to do that which would affect the rights of alien Chinamen, because it was pointed out that, if they could come to the conclusion that the primary object of legislation, in that case, had been the regulation of coal mines, that, then, even if, as a matter of regulation, a disability had been imposed upon an alien it might have been upheld, because the general subject of the regulation of coal mines was within those subjects given to the provincial legislatures."

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[158] Transcript from shorthand notes of Barnett & Barnett, pp. 22-23.

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[159] *Ibid.*, p. 18

[160] *Ibid.*, p. 42. And see the way these two Privy Council decisions are discussed in the subsequent British Columbia case of *In re Coal Mines Regulation Act* (1904), 10 B. C. 408. It must be remembered that the children of naturalized aliens are not aliens at all, but natural-born British subjects: see per Martin, J., S. C. at pp. 426-7; *Cunningham* v. *Tomey Homma*, [1903] A. C. at p. 156. But with regard to what Martin, J., says, in the place referred to, it is submitted that there is nothing in the Privy Council decisions justifying the conclusion that *ultra vires* legislation in relation to aliens before or after naturalization, can be rendered *intra vires* by extending the legislation to their children and grandchildren. And see *Rex* v. *Priest* (1904), 10 B. C. at p. 436.

In 1899 the British Columbia legislature passed the Placer Mining Amendment Act, the effect of which was that no person other than a British subject might thereafter be recognized as having any right or interest in any of the mining properties to which the British Columbia Placer Mining Act applied. In a despatch of the Secretary of State for the Colonies of September 18th, 1899, as, also, in a report of the Minister of Justice of January 12th, 1900, it was objected that under the law as laid down by the Privy Council in *Union Colliery Co.* v. *Bryden,*[161] this legislation was *ultra vires*; and in a further report of April 12th, 1900, the Minister of Justice recommended that it should be disallowed, and it was disallowed accordingly.[162] In his latter report, the Minister of Justice expresses the view that it followed from the decision in the *Union Colliery Company* case, that provincial legislatures "cannot make exceptional provisions affecting aliens' rights and privileges."[162a] The provincial Attorney-General

Minister of Justice shouldn't act simply as a court. why not had in vain contended that " there is a wide distinction in law between an attempt to legislate with regard to the nature of the employment in which an alien may engage in the province, and a law, such as that in question, dealing entirely with the public property of the province."

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[161] [1899] A. C. 580.

[162] Provincial Legislation, 1899-1900, p. 120.

[162a] In 1885 Crease, J., held *ultra vires* as, amongst other objections, interference with the rights of aliens, as imposing

It was, apparently, with reference to the Privy Council decision in *Cunningham* v. *Tomey Homma*,[163] that the Minister of Justice reported in regard to a British Columbia Act prohibiting aliens from voting at municipal elections, that the question of the authority of the legislature to pass such an Act had been determined favourably to the province.[164] The power would seem to be found in No. 8 of section 92 (' municipal institutions in the province '), just as in the *Tomey Homma* case, it had been found in No. 1 of section 92 (the amendment of the Constitution of the province).

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unequal taxation (as to which, however, see *supra*, p. 239), and as contrary to Imperial Treaty (as to which see *supra* pp. 67-8), the Chinese Regulation Act, 1884, which imposed an annual tax of $10 on every Chinese in British Columbia above 14 years of age, who on payment was to receive a license, stringent penalties being imposed on any Chinaman found without such a license, and, also, providing that the sum payable by Chinamen for a free miner's certificate should be three times the ordinary amount; and the Privy Council, on petition, granted leave to appeal on the ground that the question at issue was of great public importance involving the power of the provincial legislature to discriminate in the imposition of direct taxation for the purposes of revenue and police: *Bull* v. *Wing Chong* (1886), 1 B. C. (pt. 2), 150, and noted Wheeler's Confederation Law, at p. 122. The appeal was not, however, proceeded with: *ibid.*

[163] [1903] A. C. 151.

[164] Provincial Legislation, 1901-1903, p. 84. *Cf.* Report of Minister of Justice of January 5th, 1901: Provincial Legislation, 1899-1900, at pp. 134-8; and *infra*, p. 430.

When in 1904-5 the British Columbia legislature enacted that no Chinaman should occupy any position of trust or responsibility in or about a mine whereby through his ignorance, carelessness or negligence, he might endanger the life or limb of any person therein employed, the Minister of Justice objected that this was *ultra vires* on the principle of the Privy Council decision in *Union Colliery Co.* v. *Bryden*,[165] and recommended disallowance; and the legislation was disallowed accordingly.[166]

Shortly before, a British Columbia Act respecting liquor licenses, which provided that no license under it should be issued or transferred to any person of the Indian, Chinese, or Japanese race, had been disallowed.[167]

By a report of December 27th, 1901, the Minister of Justice compelled amendment under threat of disallowance of a number of British Columbia Acts incorporating railway companies which provided, in effect, that no aliens should be employed on them during construction, unless it were demonstrated to the satisfaction of the Lieutenant-Governor in Council that the work could not be proceeded with without the employment of such aliens.[168]

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[165] [1899] A. C. 580.

[166] Provincial Legislation, 1904-1906, pp. 130-131, 138. *Cf. Ibid.*, 1899-1900, pp. 134-8. The appeal to the Privy Council as to the validity of this provision, referred to as pending in the memorandum of the Attorney-General of British Columbia printed in Provincial Legislation, 1904-6, at p. 133, was not proceeded with, the Act having been thus disallowed. The British Columbia Supreme Court had previously held it *intra vires* on the authority of the *Bryden Case*, in *In re Coal Mines Regulation Act* (1904), 10 B. C. 408.

[167] Provincial Legislation, 1899-1900, pp. 104, 123.

[168] *Ibid.*, 1901-1903, pp. 64, 74-75.

Provincial legislation incidentally relating to aliens.—It is not, of course, to be supposed that provincial legislation may never even incidentally relate to aliens, as, *e.g.,* by providing that aliens may be shareholders in provincial companies, and entitled to vote on their shares, and be eligible as directors. Nevertheless, as recently as October 29th, 1904, the Minister of Justice has objected to such legislation, saying that it is, in his opinion, "*ultra vires,* as legislation with regard to rights and capacities of aliens is clearly within the exclusive authority of Parliament." He added, however, that he did not on that account recommend disallowance as he was not aware that the public interest so required, and judicial effect might, of course, be given to the objection if it should become necessary to raise it.[169]

As to 'naturalization' in the clause under consideration, Strong, C.J., would seem to have considered that the Dominion parliament could not, in spite of it, turn an alien into a naturalized British subject. He says,[170]: "It is out of the question to say that the legislature of a dependency created by an Imperial statute has sovereign powers of legislation in all personal and extra-territorial matters relating to British subjects resident within its limits irrespective of express grant. In the case of the national character of residents of alien origin it has no such power. Personal allegiance is a matter which has always been and always must be, in the absence of the statutory delegation of its powers, dealt with by the Imperial parliament. The acquisition of British nationality is a matter upon which the Imperial parliament has the exclusive right of legislation, although the effect of alienage upon the local tenure of land may be dealt with by a colonial legislature."[170a]

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[169] Provincial Legislation, 1904-1906, p. 3. See, further, as to such legislation, Legislative Power in Canada, pp. 459-460. See, also, per Strong, C.J., *In re Criminal Code sections relating to Bigamy* (1897), 27 S. C. R. at pp. 474-5; and *infra*, p. 314.

[170] *In re* Criminal Code Sections relating to Bigamy (1897), 27 S. C. R. 461, at pp. 474-5.

26. Marriage and divorce.

The Privy Council have now, on the recent reference to them of certain questions concerning marriage, authoritatively determined the relation of this Dominion power to the provincial power conferred by No. 12 of section 92, over 'solemnization of marriage in the province.' They had previously observed in *Citizens Insurance Co.* v. *Parsons*,[171] that solemnization of marriage would come within the general description of 'marriage and divorce,' yet that 'solemnization of marriage in the province' is enumerated among the classes of subjects in section 92, and that no one can doubt, notwithstanding the general words of section 91, that this subject is still within the exclusive authority of the legislature of the provinces; and they cite this as illustrating the fact that, with regard to certain classes of subjects generally described in section 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In such cases, they add: "It is the duty of the Courts, however difficult it may be, to ascertain in what degree and to what extent authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them, the limits of their respective powers." On the recent reference,[172] their lordships have done this in respect to the matter in hand. As they state in their judgment the contention on the part of the ~~provinces~~ Dominion was that the provincial power extends only to the directory regulation of the formalities by which the contract of marriage is to be authenticated, and does not extend to any question of validity. Their lordships refused to accede to this view. They say: "Their lordships have arrived at the conclusion that the jurisdiction of the Dominion parliament does not, on the true construction of sections 91 and 92, cover the whole field of validity. They consider that the provision in section 92 conferring on the provincial legislature the exclusive power to make laws relating to the solemnization of marriage in the province, operates by way of exception to the powers conferred as regards marriage by section 91, and enables the provincial legislature to enact conditions as to solemnization which may affect the validity of the contract. There have, doubtless, been periods, as there have been and are countries, where the validity of the marriage depends on the bare contract of the parties without reference to any solemnity. But there are, at least, as many instances when the contrary doctrine has prevailed. The common law of England, and the law of Quebec, before Confederation, are conspicuous examples, which would naturally have been in the minds of those who inserted the words about solemnization into the statute. *Prima facie* these words appear to their lordships to import that the whole of what solemnization ordinarily meant in the systems of law of the provinces of Canada at the time of Confederation is intended to come within them, including conditions which affect validity."

[170a] See on the general subject Article *sub voc.*, 'British Subject' in Encyclopedia of Laws of England, 2nd ed., Vol. 2, p. 413 *seq.* Also Article by John W. Salmond on Citizenship and Allegiance (1901) 17 L. Q. R. 270, 18 L. Q. R. 49; and one on Naturalisation of Aliens (1905), 25 C. L. T. 181, by N. W. Hoyles; and Keith's Responsible Government in the Dominions, Vol. 3, pp. 1322-4.

[171] (1881) 7 App. Cas. at p. 108. See Legislative Power in Canada, p. 488, n. 3.

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[172] [1912] A. C. 880. Reported below, 46 S. C. R. 132. So far as the judgments of the Supreme Court discuss the law of the province of Quebec as to marriage they are outside the purview of this book, as that law was pre-confederation law, and involved no question under the British North America Act.

It must be noted, however, that the provincial power extends only to 'solemnization of marriage in the province,' and although this Privy Council decision establishes the fact that a provincial legislature may enact that no marriage celebrated, or purporting to be celebrated, in the province of which it is the legislature, shall be valid unless solemnized in the manner and under the conditions prescribed by it; yet this is not saying that a provincial legislature can validly enact that inhabitants of the province of which it is the legislature, shall not be validly married if they cross the border and are married according to the solemnities and under the conditions prescribed by the legislature of another province for marriages within the borders of that province. The effect of the Privy Council decision is merely that the Dominion parliament cannot enact, as was proposed by what was known as the 'Lancaster Bill,' that any marriage performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any difference in the religions of the persons so married, and without regard to the religion of the person performing the ceremony; because a province has power to enact that no marriage solemnized within its borders should be valid where the parties or one of them is of a particular religion, unless solemnized before some special class of persons authorized in that province to solemnize marriages, e.g., a Roman Catholic priest.

To take a concrete instance, the Quebec legislature might enact that every marriage celebrated in the province of Quebec must be celebrated before a Roman Catholic priest, if both or one of the contracting parties are Roman Catholic; and further, that, unless so celebrated nothing purporting to be such a marriage shall be a true and valid marriage at all. But the Quebec legislature would have no power to enact that two French-Canadian Protestants, or a Roman Catholic man and a Protestant woman, or *vice versa,* domiciled in Quebec, could not cross the border and be married in Ontario, according to Ontario law; nor that, if they did so, their marriage should be any the less a good and valid marriage than it would have been, if they had stayed in Quebec, and been married before a Roman Catholic priest.[172a]

Reference may here be made, also, to the opinion of the Law Officers of the Crown in England in 1870,[173] to the effect that under 'the solemnization of marriage in the province,' the provincial legislatures have the power of legislating upon the subject of the publication of banns, and issue of marriage licenses; while 'marriage and divorce' in section 91, "signify all matters relating to the status of marriage, between what persons and under what circumstances it shall be created, and (if at all) destroyed.'

In *Watts* v. *Watts,*[174] the Privy Council have held that the Supreme Court of British Columbia still has jurisdiction to entertain a petition for divorce between persons domiciled in that province, and in respect of matrimonial offences alleged to have been committed therein, such jurisdiction having existed since before Confederation, and not been taken away.

[172a] *Cf. Swifte* v. *Attorney-General of Ireland*, [1912] A. C. 276.

[173] Dom. Sess. Pap. 1877, No. 89, p. 340.

[174] [1908] A. C. 573, 13 B. C. 281. See to same effect *Sheppard* v. *Sheppard* (1908), 13 B. C. 486. As to the British Columbia legislature having no jurisdiction to confer on the full Court of the province any appellate jurisdiction in divorce matters, see *Scott* v. *Scott* (1891), 14 B. C. 316. And as to the provincial legislature not being able to legislate as to the rules of evidence by which a right of divorce is to be established, see report of Sir Oliver Mowat, Minister of Justice, of Nov. 10th, 1897, on a new Brunswick Act: Hodgins' Prov. Legisl., 1896-8, p. 52. As

In 1907, the Ontario legislature assumed to enact that the High Court of Justice in Ontario should have jurisdiction, subject to certain conditions and qualifications, to declare and adjudge a ceremony of marriage gone through between two persons either of whom is under eighteen years of age, without consent of father, mother, or guardian, not to constitute a valid marriage. Doubt, however, has been expressed as to the constitutionality of this enactment,[175]; but it is, it is submitted, supported by the recent Privy Council judgment just referred to, that it is *intra vires.*

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters.

Criminal law was placed under Dominion jurisdiction no doubt, because, as Harrison, C.J., says, in *Regina* v. *Lawrence,*[176]: "It is important that the law of a country as to crime and criminal procedure shall be uniform, so that the rights of all citizens shall be, as much as possible, equally respected, and the public wrongs

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in British Columbia, so in New Brunswick, and Nova Scotia. provincial Courts exercise divorce jurisdiction dating from before Confederation. This is not so in any other province; nor is there as yet any Dominion Divorce Court. In Prince Edward Island, however, under local statute 5 Wm. IV., c. 10 (1836), the Lieutenant-Governor and Council have jurisdiction in all matters touching marriage and divorce. See Article on Divorce, by N. W. Hoyles, 37 C. L. J. 481 *et seq.*

[175] *May* v. *May* (1910), 22 O. L. R. 559, 565; *Malot* v. *Malot* (1913) 4 W. N. 1405.

[176] (1878) 43 U. C. R. at p. 174.

of any citizen, as much as possible, equally punished.'' Two things, however, create difficulty in the construction of No. 27, namely, that whereas 'criminal law' is thus assigned to the Dominion parliament, 'the imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section,' is by No. 15 of section 92, assigned to the provincial legislatures; and whereas 'procedure in criminal matters' is assigned to the Dominion parliament, 'the constitution, maintenance, and organization of provincial Courts, both of civil and criminal jurisdiction,' is, by No. 14 of section 92, assigned to the provincial legislatures.

Dealing, then, with the first point, we must, in accordance with the principle of construction already noticed,[177] read No. 15 of section 92, as excepted out of 'criminal law' assigned to the Dominion by No. 27 of section 91.[178] And so, Lord Herschell is reported as remarking of No. 27 of section 91, upon the argument in the Liquor Prohibition Appeal, 1895,[179]: "It is all the criminal law in the widest and fullest sense, except that part of it which is necessary for the purpose of enforcing, whether by fine, penalty, or imprisonment, any of the laws validly made under the sixteen clauses under which laws are to be made by the provincial parliament." And now, in *Attorney-General for Ontario* v. *Hamilton Street R. W. Co.,*[180] the Privy Council, in holding the Ontario Lord's Day Act "treated as a whole" *ultra vires,* as legislation upon criminal law, has said: "The reservation of the criminal law for the Dominion of Canada is given in clear and intelligible words which must be construed according to their natural and ordinary signification. Those words seem to their lordships to require, and, indeed, to admit, of no plainer exposition than the language itself affords. Section 91, sub-section 27 of the British North America Act, 1867, reserves for the exclusive legislative authority of the parliament of Canada 'the criminal law, except the constitution of Courts of criminal jurisdiction.' It is, therefore, the criminal law in its widest sense that is reserved, and it is impossible, notwithstanding the very protracted argument to which their lordships have listened, to doubt that an infraction of the Act, which in its original form, without the amendment afterwards introduced,[181] was in operation at the time of Confederation, is an offence against the criminal law. The fact that from the criminal law generally there is one exception, namely, 'the constitution of Courts of criminal jurisdiction,' renders it more clear, if anything were necessary to render it more clear, that with that exception . . . the criminal law, in its widest sense, is reserved for the exclusive authority of the Dominion.'"[182]

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[177] *Supra*, pp. 112-118; 315-6.

[178] Per Richards, C.J., in *Regina* v. *Boardman* (1871), 30 U. C. R. at p. 556.

[179] [1896] A. C. 348: printed report of argument, published by Wm. Brown & Co., London, 1895, pp. 280-1.

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[180] [1903] A. C. 524. Reported below in Ontario Court of Appeal (1902), 1 O. W. R. 312. Nevertheless in *Kerley* v. *London and Lake Erie Transportation Co.* (1912), 26 O. L. R. 588, Boyd, C., held that provincial legislatures can require provincial companies, as a condition of their incorporation, not to work on Sunday. See as to this case, *infra*, pp. 455-7.

[181] By this amendment, as to the validity of which their lordships give no opinion, the Ontario Legislature prohibited tramway companies, subject to certain exceptions, working their trains on Sunday.

This suffices to dispose of the suggestion made in several provincial cases, that to come within the meaning of 'criminal law' in No. 27 of section 91, and so to fall under the exclusive jurisdiction of the Dominion parliament, an offence must be of that kind which is esteemed to be *malum in se,* quite apart from its also being *malum prohibitum.*[183] And so in *Rex* v. *Lee,*[184] it was argued unsuccessfully that it is not in the power of Parliament to make a crime of an act which has nothing criminal in its nature; and that the Dominion Act there in question (which made it an indictable offence for a dealer to make use of any written or printed matter or advertisement, or apply any mark to any article of certain specified kinds, guaranteeing, or purporting to guarantee that the gold or silver on or in such article will wear or last a specified time), assumed to render penal what is nothing more than the mere warranting, in writing or by means of a mark, the lasting quality of an article, a matter of contract or representation not within the realm of criminal law. The Ontario Court of Appeal held the legislation *intra vires,* Meredith, J.A., observing (pp. 495-6): " In regard to such questions as that involved in this case, the rule may be that which is said to prevail in the Courts of the United States, which, as applied to Canada, may be thus stated: Parliament has power to prohibit and punish any act as a crime provided it does not violate any exclusive powers of legislation conferred upon the legislatures of the provinces; and the Courts cannot consider the question further than to see whether there has been a violation of such exclusive powers. There was no such violation

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[182] Followed in *In re Legislation respecting abstention from Labour on Sunday* (1905), 35 S. C. R. 581; *Rex* v. *Yaldon* (1908), 17 O. A. R. 179. The words "treated as a whole," in the Privy Council judgment, are particularly to be noticed, and are emphasized in the recent Quebec case of *Couture* v. *Panos* (1908), R. J. Q. 17 C. B. 560, 564. See *infra,* p. 601. In *Ouimet* v. *Bazin* (1912), 46 S. C. R. at p. 528 (as to which case see *infra* p. 606). Anglin, J., says: "I do not regard the decision of the Judicial Committee" (*sc.* in the *Hamilton Street R. W. Co.* case), "as depending on the fact that the Upper Canada 'Lord's Day Act' (C. S. U. C. 1859, c. 104) had been originally enacted by a legislature clothed with authority to pass criminal laws. Neither can I accede to an argument which involves the view that legislation held to be criminal in one province of Canada may be regarded as something different in another province, or that the phrase 'the criminal law' used in s. 91, s.-s. 27, of the British North America Act may have a meaning different from that which would be attached to it in other legislation of the Imperial parliament. Halsbury, L.C., says that it is 'the criminal law in its widest sense that is reserved' to the Dominion parliament."

[183] *E.g.* per Allen, C.J., in *Queen* v. *City of Fredericton* (1879), 3 P. & B. at pp. 188-9; per Street, J., in *Regina* v. *Wason* (1889),

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17 O. R. at p. 64. Archambault, J., however, in *Ouimet* v. *Bazin* (1910), R. J. Q. 20 C. B. at p. 423, delivering the judgment of the majority of the Court, upholds the distinction as a line of demarcation between Dominion power under No. 27 of section 91, and provincial power under No. 15 of section 92, saying:—"A provincial legislature cannot legislate on a *malum in se* because it would be a criminal law, but it can inflict a penalty or imprisonment for the violation of laws which it passes within the limits of its legislative power, and the act thus prohibited does not thereby become a criminal act, a *malum in se*, but simply a *malum prohibitum*." See further, as to this case, *infra*, p. 606.

[184] (1911) 23 O. L. R. 490.

in the legislation in question. The purpose of the legislation, doubtless, was to prevent fraud under circumstances in which the public might easily be deluded by an elusive vendor."

This Privy Council decision, also, seems to displace the view expressed by Wetmore, J., in *Queen* v. *City of Fredericton,*[185] that: "To ascertain the jurisdiction given to Parliament in reference to criminal matters, we must look at the law as it stood at the time the British North America Act was passed:" although there are cases where in construing that Act, it is pertinent to consider the condition of things before Confederation.[186] And the question whether before Confederation certain offences have been embraced within the criminal law may, perhaps, determine the power of provincial legislatures to deal with such offences after Confederation. And so, upon the argument before the Privy Council in this very case of *Attorney-General for Ontario* v. *Hamilton Street R. W.,*[187] Lord Davey is reported to have said to counsel for the province: "Your difficulty is that at the time of Confederation this (*i.e.,* the infraction of the provisions of the Lord's Day Act), was already a crime. It is not as if they had passed an Act for the first time for dealing with a matter that was within their jurisdiction, and imposed the penalty for the purpose of enforcing an Act of that character. That is not the case. It was already a crime at the time of Confederation.

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[185] (1879) 3 P. & B. at p. 160. *Cf. Regina* v. *Shaw* (1891), 7 M. R. at p. 518.

[186] See *supra* pp. 15-16.

[187] [1903] A. C. 524.

And, therefore, this subject, which is already a crime, was outside their jurisdiction to deal with. If they were dealing with this for the first time I could follow the argument." [188] And, in *Beaulieu* v. *La Cité de Montreal*,[189] the Superior Court at Quebec held that the Quebec legislature had no power to add to a law of the old province of Canada passed before Confederation, which forbade vagrancy, disorderly conduct, etc., in the streets of Montreal, and made an infringement punishable by a fine of $20—a clause that 'in the case of habitual and incorrigible drunkenness,' the magistrate might sentence the delinquents to imprisonment, upon the ground that legislation making drunkenness an offence punishable in itself, apart from disorderly conduct or a breach of the peace, is within the exclusive jurisdiction of the Dominion.

To pass to another subject, if by "competency" be understood "exclusive competency,"[190] there seems no difficulty in acquiescing in what Sir James Hannen is reported as having said upon the argument in *Russell* v. *The Queen*,[191]: "If you have got a thing clearly—I will not stop to consider what would be clearly—but if you have got a thing clearly within the competency of the provincial legislature, it certainly seems to me that the Dominion parliament could not indirectly take that away from the province by making it a crime to do that which the provincial legislature had authority to say might be done:" and this would, of course, apply, *a fortiori*, to any power which the Dominion parliament has, apart from No. 27 of section 91, to pass laws creating offences and imposing punishment in the interests of peace, order, and good government in the Dominion.[192]

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[188] Marten, Meredith, Henderson and White's Shorthand Notes, 2nd day, pp. 25-26.

[189] (1907), R. J. Q. 32 S. C. 97. In his report of January 28th, 1889, as Minister of Justice, Sir John Thompson, referring to a Nova Scotia Act, giving a town council power to make by-laws for 'the prevention and punishment of vice, drunkenness, immorality, and indecency in the public streets, highways, and other public places, and prevention of the profanation of Sunday,' observes: "These matters are within the control of the parliament of Canada, and have been legislated upon by that parliament, and it can only be competent for a provincial legislature to enact laws in respect to them for the purpose of aiding the enforcement of the laws of Canada. In any other view it would be difficult to assent to the constitutional character of the provisions mentioned:" Hodgins' Prov. Legisl. 1867-1895, at p. 581.

[190] See *supra*, pp. 107-111; 164-179.

We shall deal generally with the provincial power under No. 15 of section 92, which has been sometimes spoken of as provincial criminal law,[193] when we come to that sub-section in the next chapter of this book: in the meanwhile the following points may be mentioned here. It goes almost without saying that, as Sir J. Thompson observes, in a report, as Minister of Justice, of February 12th, 1894, on some Quebec Acts,[194]: "A provincial legislature has, of course, no power to authorize any Act which has been constituted an offence by Parliament." Thus, in *L'Association St. Jean Baptiste* v. *Brault*,[195] the Supreme Court held that provincial legislatures have no jurisdiction to permit the operation of lotteries forbidden by the criminal statutes of Canada: a decision which nullifies the decision in *Société des Ecoles Gratuites* v. *Cité de Montréal*,[196] to the contrary, where, however, the point as to lotteries being criminal does not seem to have been taken. So, again, in *Thomson* v. *Wishart*,[197] the Manitoba Court of Appeal have held that as maintenance and champerty had become obsolete as crimes in England in 1870, section 12 of the Criminal Code (R. S. C. 1906, ch. 146), introducing into Manitoba the criminal law of England as it was on July 15th, 1870, in so far as applicable to Manitoba, did not introduce the law of maintenance and champerty, considered as crimes, into that province; and that, this being so, a Manitoba Act allowing an attorney or solicitor to agree with a client to be paid for his services by receiving a share of what might be recovered in an action, is not *ultra vires* as trenching upon or intended as a repeal of any provision of the criminal law. Perdue, J.A., delivering the judgment of the Court, says: " This is purely a matter relating to property and civil rights, and until the Dominion parliament steps in and makes champerty an actual criminal offence . . . I should be prepared to hold that the provincial enactment was within the powers of the legislature."

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[191] Published by Wm. Brown & Co., London, 1895: 2nd day, at p. 102.

[192] See *supra*, pp. 140-3; *Regina* v. *Harper* (1892), R. J. Q. 1 S. C. at pp. 333-5, per Dugas J.; and Legislative Power in Canada, at p. 384.

[193] *Eg.* per Rose, J., in *Regina* v. *Hart* (1891), 20 O. R. at pp. 612-4. And see *infra*, p. 583n.

[194] Hodgins' Provincial Legislation, 1867-1895, p. 461.

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[195] (1900) 30 S. C. R. 598.

[196] (1901) R. J. Q. 19 S. C. 148. As to the Dominion power to impose forfeiture as punishment, *e.g.*, the forfeiture of money found in a common gambling house, see *O'Neil* v. *Tupper* (1896), 26 S. C. R. at p. 132, 4 R. J. Ql. (Q. B.) 315.

[197] (1910) 19 Man. 340.

So neither can provincial legislatures alter or amend the criminal law, using that term of course in the sense in which it is used in No. 27 of section 91. Thus in *The Queen* v. *Halifax Electric Tramway Co.,*[198] a direct amendment by the provincial legislature of an Act passed prior to Confederation, and entitled 'Of offences against religion,' prohibiting servile labour (works of necessity and mercy excepted) on the Lord's Day, was held to be *ultra vires,* upon the ground that the statute thus sought to be amended was criminal law, while at the same time, it was not denied that the provincial legislature would have power to deal with the subject by legislation coming under the head of property and civil rights.[199] And, on a like principle, it was held in *McDonald* v. *McGuish,*[200] that there was no appeal to the Supreme Court of the province from a judgment of the County Court questioning a conviction by a magistrate under the Canada Temperance Act, as none was expressly given by the latter Act, although the provincial Acts creating and organizing the County Courts gave a general appeal to the Supreme Court of the province. It would, indeed, be *ultra vires* of a provincial legislature to confer a right of appeal from a judgment on

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[198] (1898) 30 N. S. 469.

[199] See *infra,* pp. 594-612.

[200] (1883) 5 R. & G. 1; followed in *The Queen* v. *Wolfe* (1886), 7 R. & G. 24.

certiorari questioning a conviction under the Canada Temperance Act.[201]

But although it cannot be denied that Parliament may draw into the domain of criminal law an act which has hitherto been punishable only under a provincial statute,[202] it does not seem possible now to accept the view indicated by Graham, E.J., in *Thomas* v. *Haliburton*,[203] that when Parliament has drawn an act into the domain of criminal law, the right of the provincial legislature to pass laws in regard to such act necessarily ceases. The provincial legislature might still, it is submitted, in many instances, legislate against the same Act in another aspect.[204] Thus, although in *Dallaire* v. *La Cité de Quebec*,[205] Langelier, A.J.C., decided that when the Dominion parliament has declared an act criminal, regulated the procedure to secure its punishment, and determined the tribunal which shall have jurisdiction to entertain it, a local legislature has no power to pass a law to punish the same act, and to determine the tribunal which shall take cognizance of it, and the procedure to follow to secure its punishment; the alleged offence there being vagrancy, and the defendant accused of being a loose, idle, or disorderly person, who being able to work, and maintain himself and family, wilfully refused and neglected to do so, which is an offence under the Dominion Criminal Code; yet, at p. 120, the learned judge is careful to say, to venture on a translation: "This is not a law the object of which is to maintain good order in the City of Quebec, but it is a law of a general character, and one which declares criminal all the acts which fall under the term vagrancy. It is, then, a true criminal law, and consequently one within the exclusive jurisdiction of the Federal Parliament. . The Quebec legislature has no power to pass laws declaring criminal all those acts of vagrancy which have already been declared such by the Criminal Code."

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[201] Per Osler, J.A., in *Regina* v. *Eli* (1886), 13 O. A. R. at p. 533, cited per Moss, C.J.A., in *In re Boucher*, 4 O. A. R. 191, q.v. *Cf.*, also, *Regina* v. *Lake* (1878), 43 U. C. R. 515; *Regina* v. *Toland* (1892), 22 O. R. 505.

[202] Per Osler, J.A., in *Regina* v. *Wason* (1890), 17 O. A. R. at p. 241. See the subject discussed 10 C. L. T. at p. 233, *seq.* In the Session of Parliament in 1882 a bill respecting pawnbrokers, to prevent them practising extortion, was withdrawn by the mover at the request of the Minister of Justice, on the ground that it was doubtful if it was within the jurisdiction of the Dominion parliament: Bourinot's Parliamentary Procedure and Practice (2nd ed. at p. 674), citing Can. Hans., 1882, p. 266.

[203] (1893) 26 N. S. at p. 73. *Cf.* per Dugas, J., in *Regina* v. *Harper* (1892), R. J. Q. 1 S. C. at pp. 533-5.

[204] See *infra*, pp. 582-585; and *supra*, pp. 199-209.

[205] (1907) R. J. Q. 32 S. C. 118.

The Dominion parliament can give jurisdiction to provincial Courts in criminal matters, in spite of any provincial statutes relating to such Courts. Thus, in *Ward* v. *Reed,*[206] although a provincial Act enacted that the County Courts should not have jurisdiction over any action against a justice of the peace for anything done by him in the execution of his office, it was, nevertheless, held, by the Supreme Court of New Brunswick, that a Dominion Act providing that penalties against Justices of the Peace for the non-return of convictions, etc., might be recovered by an action of debt by any person suing for the same in any Court of Record in the province in which such return ought to have been made, was *intra vires* of the Dominion parliament, because (p. 283), " it is a matter connected with the administration of the criminal law which belongs exclusively to the Dominion parliament, which has the right, in legislating upon a matter within its control, to give authority to the existing Courts in the province to try such matters.''[207]

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[206] (1882) 22 N. B. 279. Specially referred to in *Pigeon* v. *Mainville* (1893), 17 L. N. at p. 72.

But the Dominion parliament cannot, of course, regulate the procedure under a provincial penal statute. Thus, in *Regina* v. *Bittle*,[208] it was held *ultra vires* of the Dominion parliament to enact that on the trial of any proceeding, matter, or question under an Act in force in any province respecting the issue of licenses for the sale of spirituous liquors, the defendant should be competent to give evidence.[209]

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[207] *Cf. Clemens* v. *Bemer* (1871), 7 C. L. J. 126; *Curran* v. *Grand Trunk R. W. Co.* (1898), 25 O. A. R. 407; *Ex parte Perkins* (1884), 24 N. B. at p. 70; *Ex parte Porter* (1889), 28 N. B. 587, where Allen, C.J., with whom Wetmore and King, JJ., concurred, seems to indicate the view that though the Dominion parliament has the right to make use of provincial magistrates for the purpose of enforcing the law, where the provincial legislature, as in the case before him, has not authorized the constitution of any Court to try such offences, yet that, if the provincial legislature has established such a Court, the Dominion parliament must, then, either make use of that Court or establish a Dominion Court under section 101 of the British North America Act, but cannot select some other provincial Court in lieu of the one so established by the provincial legislature. *Sed. quœre*; see *supra*, pp. 148-150.

[208] (1892) 21 O. R. 605. And see Legislative Power in Canada, at p. 464, n. 1.

[209] As to the Dominion power over criminal law not debarring a provincial legislature preventing and punishing obstruction to the business of legislation, although the interference or obstruc-

Provincial legislatures alone have power to regulate the procedure under the penal laws which they have authority to enact under No. 15 of section 92 of the British North America Act. There seems no reason to doubt the correctness of any part of Dunkin, J.'s, statement of the law in *Ex parte Duncan*,[210] where he says: "Whatever infractions, whether as to matters of Dominion or provincial legislation, Parliament sees fit to designate as crimes, it, and it alone, can so declare, and as such punish, and to that end regulate procedure. Whatever infractions of any provincial law coming within the purview of this 92nd section of the British North America Act Parliament may not see fit thus to deal with, the interested province may punish by fine, penalty, and imprisonment; but its so doing does not make the offence to be thus punished a crime, nor the procedure laid down in order to its punishment, procedure in a criminal matter. On the contrary, such whole matter must remain a civil matter within what is here the true meaning of these respective terms."[211]

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tion be of a character involving the commission of a criminal offence, or bringing the offender within reach of the criminal law, see *Fielding* v. *Thomas*, [1896] A. C. 600; Legislative Power in Canada, p. 748, n. 1, and *supra*, pp. 155-158. And as to the right to fines and penalties under the criminal law, see *infra*, p. 576, n. See also Legislative Power in Canada, pp. 463-8; and to the cases there cited, add *Regina* v. *Fox* (1899), 18 O. P. R. 343; *McMurrer* v. *Jenkins* (1907), 3 E. L. R. 149.

[210] (1872) 16 L. C. J. at p. 191.

[211] *Semble*, the provision of the Criminal Code (R. S. C. 1906, c. 146, s. 13), that 'no civil remedy for any act or omission shall be suspended or affected, by reason that such act or omission amounts to a criminal offence,' is *ultra vires* as assuming to bind the provincial civil tribunals: *Paquet* v. *Lavoie* (1898), R. J. Q. 7 Q. B. 277. So, also, in *Richer* v. *Gervais* (1894), R. J. Q.

Procedure in criminal matters.—We can now proceed to the second point of difficulty arising under No. 27 of section 91, namely, to distinguish 'procedure in criminal matters,' from the constitution of a Court of criminal jurisdiction within the meaning of No. 14 of section 92. It is not possible, however, to do more than state the actual decisions. In *The King* v. *Walton,*[212] the Ontario Court of Appeal held, that a provincial legislature has power to determine the number of grand jurors to serve at Courts of oyer and terminer, and general sessions, this being a matter relating to the constitution of the Courts; but that the selection and summoning of jurors, including talesmen, and fixing the number of grand jurors by whom a bill may be found, relate to procedure in criminal matters in respect of which the Dominion parliament

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6 S. C. 254, it was held that a Dominion Act declaring a non-juridical day must be interpreted as relating only to Dominion matters. As to the power of the Dominion parliament to include within the criminal law of Canada acts of Canadian subjects committed abroad, see *In re Criminal Code Sections relating to Bigamy* (1897), 27 S. C. R. 461; and *supra*, pp. 103-5. *Cf.*, however, an Article on Extra-territorial criminal legislation of Canada, by Frank A. Anglin, in 19 C. L. T. at pp. 1, 38, who arrives at the conclusion that, subject to the single possible exception of Canadian sailors or marines upon a Canadian vessel of war, as to which he cites the Dominion power over 'Militia, Military and Naval service and Defence' (No. 7 of section 91), the Dominion parliament 'has not been clothed with jurisdiction to so regulate the conduct of Canadians as to constitute their acts, committed without the territorial limits of Canada, criminal offences.' See, also, *Chandler* v. *Main* (1863), 16 Wisc. 422.

[212] (1906) 12 O. L. R. 1. And see, also, *Regina* v. *O'Rourke* (1882), 32 C. P. 388, 1 O. R. 464, and *Regina* v. *Prevost* (1885), M. L. R. 1 Q. B. 477, where the Dominion Act adopting the provincial laws as to what persons should be qualified to serve as grand jurors or petit jurors in criminal cases, subject to any provision in any Act of the Parliament of Canada, was held *intra vires*. See, however, *Sproule* v. *Reginam*, 2 B. C. (Irving) 219.

alone has power to legislate. The Supreme Court of Nova Scotia in *Queen* v. *Cox,*[213] had held the same way. In that case Henry, J., says (p. 316): "It seems clear to me that both the grand jury and the petit jury are constituent elements in our Superior Criminal Courts." On the other hand, Townshend, J., says (p. 315): "It is open to a great deal of argument whether or not the grand jury are a part of the constitution of the Court;" while Ritchie, J., says (p. 314): "In many cases the procedure of the Court is so combined with its constitution and organization that it seems very difficult, if not impossible, to define clearly the line separating them."

In *Regina* v. *Bradshaw,*[214] it was held by the Ontario Court of Queen's Bench, that a Dominion Act authorizing the Court of General or Quarter Sessions of the Peace to try an appeal from a summary conviction without a jury, where no jury is demanded by either party, is *intra vires* of the Dominion parliament. At p. 569, Gwynne, J., delivering judgment, says, that the enactment comes within ' procedure ' of the Court in item 27 of section 91; and that the conferring power upon the parties to an appeal in criminal matters to dispense with the jury if they think fit, an dto submit themselves to the judgment of the Court of General Sessions without a jury, cannot be said to interfere with the constitution of the Court.[215]

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[213] (1898) 31 N. S. 311.

[214] (1876) 38 U. C. R. 564.

[215] Followed by McDougall, C.J., in *Queen* v. *Malloy* (1900), 4 Can. Cr. Cas. 116, who held that a provision of the Criminal

In *In re Chantler,*[216] Osler, J.A., held, that it is not within the power of a provincial legislature to regulate or control the inspection of the jurors' book or jury panel so far as it relates to criminal causes or matters. He says (p. 535), after referring to *Regina* v. *O'Rourke, supra*:—"If the proceedings which result in the preparation of the panel for the trial of criminal causes and matters are matters of criminal procedure, *a fortiori,* anything which relates to the right of the accused in respect of the panel itself must be equally so. I suppose it would hardly be contended that it would be within the power of the local legislature to enact that the panel should not be inspected or the accused entitled to a copy of it until after he had pleaded, or until after the opening of the Court; and the restriction of the right to the period of six days before the sittings" (as by the provincial enactment in question) "is not in the least different in principle."

By Order in Council of April 19th, 1888, a British Columbia Act, to establish a Court of Appeal from the summary decisions of magistrates, which gave a right of appeal to a Judge of the Supreme Court of British Columbia from any conviction made under a Dominion statute, was disallowed as legislation affecting procedure in criminal matters.[217] And in a report of May

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Code that the appellate Courts should try the appeal from a summary conviction without a jury was one relating to the procedure, and not to the constitution of the Court.

[216] (1905) 9 O. L. R. 529.

[217] Hodgins' Provincial Legislation, 1867-1895, at p. 1108. As to a provincial legislature authorising Industrials Schools as places of confinement for persons convicted of criminal offences under the Dominion criminal law, see *infra*, p. 578.

10th, 1892, upon certain British Columbia Acts, Sir John Thompson, as Minister of Justice, says of certain sections of an Act to amend the Jurors Act,[218]: "The sections of this Act, 8 to 15 inclusive, deal with the subject of juries in connection with the trial of criminal cases. In the view of the undersigned those provisions have to do exclusively with procedure in criminal matters as distinguished from the constitution of Courts of criminal jurisdiction, and are, therefore, beyond the provincial jurisdiction."[219]

In *Ex parte Vancini*,[220] the Supreme Court of New Brunswick held that a provincial Act which created stipendiary and police magistrates a Court with all the powers and jurisdiction which any Act of the parliament of Canada had conferred or might confer, was *intra vires*. The case went to the Supreme Court,[221] where, however, it was found unnecessary to pass upon this provincial Act. Hannington, J. (36 N. B., at p. 464), says: "It is contended that the provincial Act in terms authorizes the parliament of Canada to establish criminal Courts; this it could not do, and did not contemplate doing, and the language used had no such meaning." *Sed quaere,* as to this suggested limitation on the provincial legislature. It is submitted that the provincial legislature could give such authority, and could also, at any time, withdraw it.[222]

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[218] Hodgins' *ibid.*, p. 1125.

[219] Sections 8 to 15 thus referred to, abolished the jury *de medietate linguæ*, allowed jurors to affirm instead of taking the oath in certain cases, dealt with the right of peremptory challenge and challenge for cause, making up a jury when the panel has been exhausted, and the right of a jury to separate in certain cases. Reference may, also, be made to *Regina* v. *Levinger* (1892), 22 O. R. 690, overruling *Regina* v. *Toland* (1892), 22 O. N. 505, and holding a provincial Act authorising the General Sessions of the Peace to try persons charged with forgery to be *intra vires*, being in relation to the constitution of a provincial Court of criminal jurisdiction. "The constitution of a Court," says Armour, C.J., delivering the judgment of the Court in the former case, "necessarily includes its jurisdiction."

[220] (1904) 36 N. B. 456; followed in *Geller* v. *Loughrin* (1911), 24 O. L. R. 18, see at pp. 23, 33, 35.

[221] 34 S. C. R. 621.

28. The establishment, maintenance, and management of Penitentiaries.

29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by the British North America Act, assigned exclusively to the legislatures of the provinces.

The classes of subjects referred to here are: the office of Lieutenant-Governor, which, by No. 1 of section 92 of the Act, is excepted out of the power of provincial legislatures to amend the constitution of the province;[223] and the classes of subjects excepted in No. 10 of section 92 out of the broad general class designated 'local works and undertakings'; which latter are:—

(*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province.[224]

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[222] See *supra*, pp. 69-73.

[223] As to the Lieutenant-Governors, see *supra*, pp. 25-29.

[224] In *Dow* v. *Black* (1874), M. L. R. 1 Q. B. at p. 192, Fisher, J., held that these last words refer to extension into another

(*b*) Lines of steamships between the province and any British or foreign country.

(*c*) Such works as, although wholly situate within the province, are before or after their execution declared by the parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces.[224a]

It is these of which we have to speak here.

In one of their very latest judgments, *City of Montreal* v. *Montreal Street Railway*,[225] the Privy Council say: "Now the effect of sub-section 10 of section 92 of the British North America Act is, their lordships think, to transfer the excepted works mentioned in sub-heads (*a*), (*b*) and (*c*) of it into section 91, and thus to place them under the exclusive jurisdiction and control of the Dominion parliament. These two sections must then be read and construed as if these transferred subjects were specially enumerated in section 91, and local railways as

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province, not to extension into a foreign country: *sed quære*. However, the point does not seem to have been finally determined even yet; but see per Garrow, J.A., in *City of Toronto* v. *Bell Telephone Company* (1903), 6 O. L. R. at p. 343; per Davies, J., in *Hewson* v. *Ontario Power Co.* (1905), 36 S. C. R. at p. 606.

[224a] As to the Dominion Act incorporating the Anticosti Company, with power to purchase that island, and to sell and lease the same, being *ultra vires* as for a Dominion object and affecting property and civil rights in Quebec, see per Ritchie, C.J., in *Forsyth* v. *Bury* (1888), 15 S. C. R. at pp. 548-9. Strong, J. (p. 551), also expresses the same opinion, while Gwynne, J., intimates an inclination to hold otherwise, but in the view these last two judges took of the case it was unnecessary for them to determine the point, while the remaining judges (Fournier and Taschereau, JJ.), do not pass upon it. And see *infra*, p. 364.

[225] [1912] A. C. 333. Reported below, 43 S. C. R. 197.

distinct from federal railways were specifically enumerated in section 92." [226]

Dominion parliament can give all necessary powers.—The first point to notice in respect to the powers of the Dominion parliament under this sub-section is that, when acting under it, it can confer upon a corporation all powers necessary to effectuate its corporate purposes. For example, to adopt and adapt words of the Privy Council in their very recent judgment in the *Toronto and Niagara Power Co.* v. *Corporation of the Town of North Toronto*,[227] Parliament may treat an electric power company whose work or undertaking extends beyond the limits of one province, or the works of which have been expressly declared to be for the general advantage of Canada, and so brought within section 91 of the British North America Act, as proper to be entrusted with freedom to interfere with municipal and private rights. And speaking of the company whose corporate powers were there in question, they add: " For that there might well have been, on the balance of advantages, good reason, the purpose of the company being to bring electric power from Niagara Falls to parts of Canada, to reach which its lines would have to pass through a series of municipal areas. To make its powers of entry subject to the veto of each municipality might mean failure to achieve its purpose."

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[226] It will be noted that the power given to the Dominion parliament by the combined effect of section 91, sub-section 29, and section 92, sub-section 10, is to make laws in relation to 'railways' connecting the province with any other or others of the provinces, or extending beyond the limits of the province, and not merely in relation to 'railway companies.' The case of *Canadian Pacific R. W. Co.* v. *Corporation of Bonsecours*, [1899] A. C. 367, presently to be noticed, illustrates this.

[227] [1912] A. C. 834. This case raised no question under the British North America Act. The whole question was the bearing of certain provisions of the Dominion Railway Act on those of the plaintiff's special Act of incorporation; and whether the former modified and restricted the latter.

And so in *City of Toronto* v. *Bell Telephone Company*,[228] the Board, overruling *Regina* v. *Mohr*,[229] held that the Dominion Act incorporating the Bell Telephone Company was *intra vires,* and that "the Bell Telephone Company acquired from the legislature of Canada all that was necessary to enable it to carry on its business in every province of the Dominion, and no provincial legislature was, or is, competent to interfere with its operations, as authorized by the parliament of Canada." They held, therefore, that a provincial Act making the consent of the municipal council a condition precedent to the exercise of the company's powers in cities, towns and incorporated villages was *ultra vires;* and that, under their said Act of incorporation, the company was entitled, without the consent of the municipal corporation, to enter upon the streets and highways of the City of Toronto, and to construct conduits or lay cables thereunder, or to erect poles with wire affixed thereto, upon or along such streets or highways.

It was argued that the Bell Telephone Company was formed to carry on, and was carrying on, two separate and distinct businesses—a local business and a long distance business; and it was contended that the local business, and the undertaking of the company so far as it dealt with local business, fell within the jurisdiction of the provincial legislature. But their lordships held that the undertaking authorized by the Dominion Act of incorporation, was one single undertaking, though for certain purposes its business might be regarded as falling under different branches or heads; and that the undertaking of the Bell Telephone Company was no more a collection of separate and distinct businesses than the undertaking of a telegraph company which has a long distance line combined with local business, or the undertaking of a railway company which may have a large suburban traffic, and miles of railway communicating with distant places.[230]

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[228] [1905] A. C. 52. Reported below, 6 O. L. R. 335, 3 O. L. R. 465.

[229] (1881) 7 Q. L. R. 183.

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[230] A curious and novel point arose in this case as to whether the company were bound by the terms of a provincial Act, which it itself had applied for, and which had been passed at its own instance, confirming its powers to erect lines of telephone along public highways and streets of cities, towns and incorporated villages, but only subject to certain restrictions, and to the consent of the municipal councils being obtained. It was argued that the company, having applied for and obtained that provincial Act, were subject to its restrictions, if not by force of the enactment, yet as the result of the legislative agreement with the municipal corporations, evidenced thereby, to which the company were parties. The Privy Council state simply that they do not find any trace of such agreement; but in the Court of Appeal, the point is dealt with by two of the judges, Garrow, J.A. (6 O. L. R. at p. 344), holding that the company could not, even by an express consent, surrender the powers entrusted to them by the Dominion parliament, to the local legislature; and Maclennan, J.A. (6 O. L. R. at pp. 349-50), holding, on the other hand, that the company could, and had agreed with the city to construct its works in the manner, and subject to the restrictions and limitations contained in the Act in question. He says: "The company has asked the legislature to modify its powers and

A Dominion corporation, then, for carrying out such an undertaking as comes within the exceptions to item 10 of section 92, is not subject, in carrying on the business as authorized by its charter, to the provincial laws of the province where it does so.[231] And this applies to Dominion corporations generally in the exercise of powers conferred upon them by the Dominion parliament, and strictly relating to the subjects of legislation enumerated in section 91 of the British North America Act.[232] But it will be otherwise when the Dominion is incorporating, not under one of its exclusive enumerated powers, but under its general residuary power,

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rights over highways in the three named classes of municipalities, and the legislature has done so. I think the company is estopped from denying the power of the legislature after it has complied with the request;" and (p. 352): "a Dominion corporation may, by application to the legislature of a province, have its powers over property in that province enlarged, diminished, varied or qualified, in any manner whatever, whether such powers were originally obtained from the Dominion or from the province, or partly from the one and partly from the other."

[231] And so per Garrow, J.A., in *City of Toronto* v. *Bell Telephone Co.* (1903), 6 O. L. R. at p. 342. And see per Maclennan, J.A., 3 S. C. at p. 347; and *La Cie Hydraulique St. Francois* v. *Continental Heat and Light Co.*, [1909] A. C. 194, *supra*, p. 125. See, also, *Canada Atlantic R. W. Co.* v. *Montreal and Ottawa R. W. Co.* (1901), 2 O. K. R. 336, and *Montreal and Ottawa R. W. Co.* v. *City of Ottawa* (1902), 4 O. L. R. 56, as to railway companies which have taken proper proceedings under the Dominion Railway Act, and been duly authorised thereunder to cross highways in a city not being bound to make compensation to the municipality therefor. And as to the Dominion Railway Act not entitling municipalities to compensation for such crossing of their highways, see per Moss, C.J., in 4 O. L. R. at p. 74. As to provincial power to tax Dominion corporations, see *infra*, p. 421.

[232] *Tennant* v. *Union Bank of Canada*, [1894] A. C. 31. As will be presently seen, *infra*, pp. 356-363, this does not mean that the undertaking of such a Dominion corporation may not be in any way affected by provincial legislation.

as, for example, incorporating an insurance company,[233] or a building and investment company.[234] In such cases it can grant no more than the power of acting as a corporation throughout the Dominion, but subject in each province, as any other person, to the laws of that province.[235]

So, again, in the recent case of *Attorney-General of British Columbia* v. *Canadian Pacific R. W. Co.*,[236] the Privy Council have decided that for the purposes of a Dominion railway company, the Dominion parliament has power to dispose of provincial Crown lands, and, therefore, of a provincial foreshore to a harbour. It was argued that there is nothing in the British North America Act to shew that the rights of the Crown in respect of a province are any more put under the legislative control of the Dominion, than there is to shew that the rights of the Crown in respect of the Dominion are put under the legislative control of the province; to which Lord Davey is reported as replying: " If there is a Dominion railway, the line of which crosses through some public property of the province, you put it in the power of the province to veto altogether the legislation of the Dominion. Parliament has said that the Dominion parliament shall have legislative jurisdiction: you would make it subject to the veto of the province, and share it in fact between the Dominion and the province.[237]

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[233] *Citizens' Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96.

[234] *Colonial Building & Investment Association* v. *Attorney-General of Quebec* (1883), 9 App. Cas. 157.

[235] See Legislative Power in Canada, pp. 618-623, 626-7, to which last reference add now, per Idington, J., in *Canadian Pacific R. W. Co.* v. *Ottawa Fire Insurance Co.* (1907), 39 S. C. R. at p. 442. It does not, however, follow that the Dominion Government might not, on occasion, veto a provincial Act affecting such Dominion companies, as for example, by attempting to legislate certain shareholders within the province into a privileged and preferential position in a public company, as compared with shareholders in other provinces. See report of Minister of Justice of Sept. 27th, 1907, on some Nova Scotia legislation affecting loan companies incorporated by the Dominion parliament, in which he threatened disallowance of such legislation as, even if competent, inconsistent with the policy of the Dominion in incorporating and defining the powers of such companies, and the relations between them and their shareholders.

[236] [1906] A. C. 204. Reported below, 11 B. C. 289. *Cf. Booth* v. *McIntyre* (1880), 31 C. P. at p. 193.

The Dominion parliament has all necessary incidental powers when legislating under No. 29 of section 91.—This is, in truth, only a more general statement of the same principle upon which the cases we have just been considering depend, a principle of general application in the construction of the British North America Act.[238] But the powers assumed under this principle must, in fact, be necessarily incidental [238a] to the exercise by the Dominion parliament of its control. Thus in one of their very latest decisions, *City of Montreal* v. *Montreal Street Railway*,[239] the Privy Council have held the provision of the Dominion Railway Act, 1906, which subjects any provincial railway, although it has not been declared by Parliament to be a work for the general advantage of Canada, to those of its provisions which relate to through traffic, to be *ultra vires;* and that an order of the Dominion Board of Railway Commissioners of Canada made under its authority was invalid, which directed, with regard to through traffic over a railway which, though originally a provincial railway, had become a federal railway by reason of having been declared by the parliament of Canada to be a work for the general advantage of Canada, and a provincial street railway, that the latter should ' enter into any agreement or agreements that may be necessary to enable ' the former company to carry out its provisions with respect to the rates charged so as to prevent any unjust discrimination between any classes of the customers of the federal line. Their lordships say, at pp. 344-45: " It must be shewn that it is necessarily incidental to the exercise of control over the traffic of a federal railway, in respect of its giving an unjust preference to certain classes of its passengers, or otherwise, that it should, also, have power to exercise control over the ' through ' traffic of such a purely local thing as a provincial railway properly so called, if only it be connected with a federal railway. . . As long as it is reasonably probable that the provincial companies will enter into such agreements, or will be coerced to enter into them by the provincial legislature which controls them, it cannot be held, their lordships think, that it is necessarily incidental to the exercise by the Dominion parliament of its control over federal railways that provincial railways should be coerced by its legislation to enter into these agreements in the manner in which it sought to coerce the street railway company in the present case to enter into the agreements specified in the order appealed from . . The right contended for in this case is in truth the absolute right of the Dominion parliament wherever a federal line and a local provincial line connect to establish, irrespective of all consequences, this dual control over the latter line whenever there is through traffic between them, at least of such a kind as would lead to unjust discrimination between any classes of the customers of the former line. In their lordships' view this right and power is not necessarily incidental to the exercise by the parliament of Canada of its undoubted jurisdiction and control over federal lines, and is therefore, they think, an unauthorized invasion of the rights of the legislature of the province of Quebec.[240]

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[237] Transcript from Shorthand Notes of Marten, Meredith, Henderson & White, pp. 112-114. Where a Manitoba Act authorizes a provincial railway company to appropriate so much of the public lands, which belonged to the Dominion, as should be deemed necessary for the purposes of the railway, the Act was disallowed by the Dominion Government: Hodgins' Provincial Legislation, 1867-1895, at pp. 855-6. Private persons, however, could not in such a case, refuse to pay the tolls exacted by a railway company improperly authorized by a provincial Act to cross Dominion lands: *O'Brien* v. *Allen* (1900), 30 S. C. R. 340.

[238] See *supra*, pp. 164-179.

[238a] As to this see *supra*, pp. 172-4.

[239] [1912] A. C. 333. Reported below, 43 S. C. R. 197.

Dominion may prohibit federal railways "contracting out." — The question of what is necessarily incidental to the Dominion power of legislation under No. 29 of section 91 came up before the Privy Council in *Grand Trunk R. W. Co.* v. *Attorney-General of Canada.*[241] There the question was the competency of the Dominion parliament to enact the provisions contained in a Dominion Act prohibiting any " contracting out " on the part of railway companies within the jurisdiction of the Dominion parliament from the liability to pay damages for personal injury to their servants. Their lordships said that the case turned upon " whether the law is truly ancillary to railway legislation;" and that it seemed to them that, " inasmuch as these railway corporations are the mere creatures of the Dominion legislature—which is admitted—it cannot be considered out of the way that the parliament which calls them into existence should prescribe the terms which are to regulate the relations of the employees to the corporation. It is true that, in so doing, it does touch what may be described as the civil rights of those employees: but this is inevitable, and, indeed, seems much less violent in such a case where the rights, such as they are, are, so to speak, all *intra familiam,* than in the numerous cases which may be figured, where the civil rights of outsiders may be affected. As examples may be cited provisions relating to expropriation of land, conditions to be read into contracts of carriage, and alterations upon the common law of carriers."[242]

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[240] In the Court below in this case (43 S. C. R. at pp. 227-8), Duff, J., suggests as a possible case where the Dominion parliament might legislate directly in respect of a provincial railway upon a subject matter in respect of which the province might have legislated in the absence of Dominion legislation, the case where such provincial railway intersecting with a federal railway, the exercise of the powers of the Dominion to legislate for the protection of the public as affected by the operation of the Dominion railway might involve the passing of regulations touching the traffic through the point of intersection of the provincial railway, and an area surrounding that point of intersection embracing to some extent the provincial line.

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[241] [1907] A. C. 65; referred to *Couture* v. *Panos* (1908), Q. R. 17 K. B. 561, *q. v.*

[242] It will be noticed that here the Privy Council were dealing with the Grand Trunk Railway, and speaking with reference to

Dominion can regulate, generally, the liability of federal railways to their employees for negligence.—In *In re Railway Act,*[243] the Supreme Court have held *intra vires* of the parliament of Canada, the Dominion Act providing that no railway company within its jurisdiction shall be relieved from liability for damages for personal injury to any employee by reason of any notice, condition, or declaration issued by the company, or by any insurance or provident Association of railway employees, or of rules or by-laws of the company or Association, or of privity of interest or relation between the company and Association or contribution by the company to funds of the Association, or of any benefit, compensation, or indemnity, to which the employee or his personal representative may become entitled, or obtain from such Association; or of any express or implied acknowledgment, acquittance, or release obtained from the Association prior to such injury purporting to relieve the company from liability.

And in *Curran* v. *Grand Trunk R. W. Co.,*[244] it was held that the provision of the Dominion

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similar through railways; but *semble*, a similar power would be recognised in connection with railways, which, originally provincial, had become federal by being declared by the Dominion parliament to be for the general advantage of Canada, or of two or more provinces. See *infra*, pp. 364-371. The Dominion parliament may possibly have power to bind Dominion railways as to the terms upon which they shall carry goods delivered to them in a foreign country; but unless in that way, it is not open to question that it has no jurisdiction to legislate as to the working of railways in a foreign country, or to fix upon a carrier operating such a railway any liabilities: *Macdonald* v. *Grand Trunk R. W. Co.* (1900), 31 O. R. 663, 5.

[243] (1905) 36 S. C. R. 136. See especially per Taschereau, J., at p. 141; and per Davies, J., at p. 143, 144-5.

[244] (1898) 25 O. A. R. 407.

Railway Act giving to any person injured by failure to observe any of the provisions of the Act a right of action 'for the full amount of damages sustained' is *intra vires;* and that the limitation of amount recoverable contained in the provincial Workmen's Compensation for Injuries Act does not apply to a workman or his representatives proceeding under that provision.[244a]

Dominion Parliament may forbid directors of a federal railway being interested in contracts with the company.—In the same way it has been decided in *Macdonald* v. *Riordan,*[245] that a provision of the Dominion Railway Act enacting that no director of a federal railway shall ' enter into, or be directly, or indirectly, for his own use and benefit interested in any contract with the company, not relating to the purchase of land necessary for the railway, or be or become a partner of any contractor with the company ' is *intra vires.*[246]

[244a] And so in *Washington* v. *Grand Trunk R. W. Co.* (1897), 24 O. A. R. 183, Osler, J.A., at pp. 185-6, says that those provisions of the Workmen's Compensation for Injuries Act as to packing railway frogs, relating as they do to the construction or arrangement of the railway track itself, must, in his opinion, be confined in their application to railway companies which are within the jurisdiction of the provincial legislatures; and he distinguishes *Canada Southern R. W. Co.* v. *Jackson* as relating to other provisions of that Act dealing with the general law of Master and Servant. The other judges do not refer to the point, the decision turning upon the construction of s. 262 of the Dominion Railway Act, 1888; and the same applies, also, to the judgments on appeal in this case: 28 S. C. R. 184; [1899] A. C. 275. In *Monkhouse* v. *Grand Trunk R. W. Co.* (1883), 8 O. A. R. 637, Spragge, C., held the same way. But in *Canada Southern R. W. Co.* v. *Jackson* (1890), 17 S. C. R. 316, the provisions of the Ontario Workmen's Compensation for Injuries Act giving employees a right of action under certain circumstances for injuries arising from the negligence of fellow servants were held to apply to a railway though it had been declared a work for the benefit of Canada; Patterson, J., saying, at p. 325:—"The rule of law which it alters was a rule of common law, in no way dependent on or arising out of Dominion legislation, and the measure is strictly of the same class as Lord Campbell's Act which, as adopted by provincial legislation, has been applied without question to all our railways." Legislation providing for the safety of the public at, or upon, a line of railway, is a matter relating to such a work or undertaking: per Meredith, J., in *Re Canadian Pacific R. W. Co. and County and Township of York* (1898), 25 O. A. R. at p. 79. *Cf.* per Osler, J., at pp. 72-3; per Burton, J.A., at p. 70.

Dominion control over railway crossings.—In their recent decision in *City of Toronto* v. *Canadian Pacific R. W. Co.*,[247] the Privy Council reiterated and applied the propositions laid down by them in *Grand Trunk R. W. Co.* v. *Attorney-General of Canada,*[248] referred to above;[249] and held *intra vires* provisions of the Dominion Railway Act authorizing the Railway Committee of the Privy Council of Canada, in the case of a railway (*i.e.,* a federal railway) constructed across any street or other public highway, at rail level or otherwise, to 'require the company to which such railway belongs,' within such time as the said committee should direct, to protect such street or highway by a watchman, or by a watchman and gates, or other protection; and to make such orders 'respecting such works and the apportionment of the costs thereof, and of any such measures of protection between the said company and any person interested therein, as appear to the Railway Committee just and reasonable.' And they upheld an order of the Railway Committee ordering the Canadian Pacific Railway Company to provide gates and watchmen at certain level crossings in Toronto; and directing that one-half of the cost attending the placing and maintaining of the gates and watchmen be contributed by the City of Toronto.[250] Their lordships say:—"If the precautions ordered are reasonably necessary, it is obvious they must be paid for, and in the view of their lordships there is nothing *ultra vires* in the ancillary power conferred by the sections on the committee to make an equitable adjustment of the expenses among the persons interested. The jurisdiction conferred over property and civil rights in the province is quite consistent with a jurisdiction specially reserved to the Dominion in respect of a subject-matter not within the jurisdiction of the province." The Board seems to have accepted the argument of Sir Robert Finlay, of counsel in this case:[251] "It is said it is not necessary the municipality should pay, but it is necessary that someone should pay. If there are three or four different ways of doing a thing you may always say no one of them is necessary, because you may take another course, but here if someone must pay, the Dominion must provide some machinery for throwing the liability in some quarter. That is necessary. The precise choice of the way of doing it is a matter that is necessarily left to the legislature, and to those to whom they entrust the authority."

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[245] (1899) 30 S. C. R. 619. Reported below, R. J. Q. 8 Q. B. 555. The Supreme Court simply adopt the reasons of Wurtele, J., delivering the judgment of the Court below. He says:—"It is a matter which essentially affects the internal economy of a railway company that its directors should not be adversely interested in any contract entered into by the company, or that they should not be or become partners of any contractors with the company." In his dissenting judgment in *Montreal Street R. W. Co.* v. *City of Montreal* (1910), 43 S. C. R. 197, Anglin, J., refers to this case of *McDonald* v. *Riordan*, and expresses the view that Wurtele, J., in his remarks upon the subject restricts the ancillary legislative jurisdiction of parliament within too narrow limits.

[246] *Cf. Royal Trust Co.* v. *Atlantic and Lake Superior R. W. Co.* (1908), 13 Ex. C. R. 42, at pp. 45-46, as to the Dominion parliament having power to legislate as to where bonds issued by a Dominion railway must be registered, and so over-ride provisions of the provincial law as to where bonds should be registered. And as to the Dominion power to regulate the contracts of federal railways generally, see per Taschereau, J., in *Citizens' Insurance Co.* v. *Parsons* (1880), 4 S. C. R. at pp. 307, 312-4. And *cf.* per Badgley, J., in *L'Union St. Jacques de Montreal* v. *Belisle*, 20 L. C. J. at p. 31. And see Legislative Power in Canada, pp. 502-505.

[247] [1908] A. C. 54. Reported below, 8 O. W. R. 348, 9 O. W. R. 785.

[248] [1907] A. C. 65.

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[249] *Supra*, p. 347.

[250] See, also, as to the jurisdiction of the Dominion parliament here in question *Re Canadian Pacific R. W. Co. and County and Township of York* (1896-8), 27 O. R. 559, 25 O. A. R 65. These two Privy Council decisions are cited and applied to the matter of immigration in *In re Narain Singh* (1908), 13 B. C. 477.

In *Grand Trunk R. W. Co.* v. *Hamilton Radial Electric Co.*,[252] Street, J., held that sections of the Dominion Railway Act enacting that the plaintiffs and other railways, and any railways whatever crossing them, were works for the general advantage of Canada, and subject thereafter to the legislative authority of Parliament, and another Dominion enactment that no railway shall be crossed by any electric railway whatever, unless with the approval of the Railway Committee, were *intra vires.*[253] In *In re Portage*

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[251] Report of Marten, Meredith, Henderson & White, shorthand writers.

[252] (1897) 29 O. R. 143.

[253] As appears from the report of this case, the Railway Committee had held that a provision in the defendants' Ontario Act

Extension of the Red River Valley Railway,[254] however, the Supreme Court unanimously held that, notwithstanding a Dominion Act specially declaring certain railways, amongst others the Canadian Pacific Railway, and, also, 'all branch lines or railways connecting with or crossing them or any of them' to be works for the general advantage of Canada, the Manitoba legislature could authorize the construction of a railway wholly within the province, but crossing the Canadian Pacific Railway line, the Railway Committee of the Privy Council first approving of the mode and place of crossing.

Further illustrations of Dominion incidental powers in connection with federal railways.—In *City of Toronto* v. *Grand Trunk R. W. Co.,*[255] where the majority of the Supreme Court had the same question before them, and came to the same conclusion, as the Privy Council in *City of*

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of incorporation forbidding them to cross at grade was *ultra vires*, and had made an order allowing them to cross at grade notwithstanding it. And *cf.* in support: *Credit Valley R. W. Co.* v. *Great Western R. W. Co.* (1878), 25 Gr. 507; *Canadian Pacific R. W. Co.* v. *Northern Pacific, etc., R. W. Co.* (1888), 5 M. R. at p. 313. See, also, *In re Portage Extension of Red River Valley R. W.*, Cas. Sup. Ct. Dig. 487; see, also, the report of the Minister of Justice of March 3rd, 1890, on a certain Manitoba Act: Hodgins' Prov. Legisl. 1867-1895, at pp. 912-3. It by no means follows that a provincial legislature could make a similar provision as to a Dominion railway crossing a provincial one. The *non obstante* clause of section 91 must always be remembered. See *supra*, pp. 128-132; and Legislative Power in Canada, p. 445, n. 3.

[254] Cas. Sup. Ct. Dig. 487.

[255] (1906) 37 S. C. R. 232. Leave to appeal to the Privy Council was refused: 37 S. C. R. IX. See as to this case, per Idington, J., in *Montreal Street R. W. Co.* v. *City of Montreal* (1910), 43 S. C. R. 197, at p. 219.

Toronto v. *Canadian Pacific R. W. Co.,*[256] Idington, J., in his dissenting judgment, in which he protests against the doctrine of necessarily incidental powers being carried too far,[257] says, at p. 253: "The appellant being a municipal corporation possesses only such powers as the Municipal Act of Ontario has given, and is subject to such liabilities as that Act expressly or impliedly imposes. There is no power that I can conceive of in the Dominion parliament to directly add to or take away from the powers of the municipality. Indirectly Dominion legislation, as for example, making the omission to observe a duty already existing a crime, may so operate on municipal or other corporations as apparently to conflict with this statement. On consideration there is clearly only apparent conflict." In *Grand Trunk R. W. Co.* v. *City of Toronto,*[258] however, Meredith, J., held that though the Dominion parliament could not confer corporate powers on municipal corporations which the provincial legislation had not conferred upon them, as, for example, empowering them to acquire and make new streets across Dominion railways, yet it could empower the Railway Committee of the Privy Council of Canada to decide whether it was necessary in the interest of the municipality that such streets should be made, and to direct how and on what terms such streets might be made, where the municipal corporation had the capacity under provincial legislation to make them.

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[256] [1908] A. C. 54. See p. 350, *supra.*

[257] In *Montreal Street R. W. Co.* v. *City of Montreal, supra,* Anglin, J., discusses very thoroughly, at pp. 238-248, the authorities as to what Dominion legislation will in different cases fall within the description of truly and properly ancillary, or necessarily incidental to the complete and effective control of federal railways.

[258] (1900) 32 O. R. 120, 127 *et seq.*

In *McArthur* v. *Northern Pacific Junction R. W. Co.*,[259] Street, J., Hagarty, C.J.O., and Osler, J.A., held that a Dominion enactment whereby all actions for indemnity for any damage or injury sustained by reason of any railway under Dominion control must be commenced within six months, was *intra vires* of the Dominion parliament,[260] being in accordance with the customary legislation in similar cases both in Canada and England; while Burton, J.A., and Maclennan, J.A., held that it was *ultra vires,* as being an unnecessary interference with property and civil rights, and with procedure in the province, the latter (p. 127) denying that any such clause is to be found in the railway legislation of either England or the United States.

Lastly, in *Keefer* v. *Todd,*[261] the Dominion Peace Preservation Acts, being Acts for the better preservation of the peace in the vicinity of public works, in which large bodies of labourers are congregated and employed, and which forbade the possession of firearms and other lethal weapons, and, also, the sale and possession of intoxicating liquors within the districts in which they were duly proclaimed in force, were held

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[259] (1888-1890) 15 O. R. 723, 17 O. A. R. 86. See this case referred to in *Montreal Street R. W. Co.* v. *City of Montreal* (1910), 43 S. C. R. 197, at p. 243.

[260] So held also in *Levesque* v. *New Brunswick R. W. Co.* (1889), 29 N. B. 588.

[261] (1885) 2 B. C. (Irving) 249. See at p. 255.

intra vires by Begbie, J., as being really laws in relation to and confined to the Canadian Pacific Railway, a public work within the meaning of sub-section (*a*) of No. 10 of section 92 of the British North America Act.

How far federal railways can be affected by provincial legislation.[262]—Much light has been thrown upon this subject by the decision of the Privy Council in *Canadian Pacific Railway Co.* v. *Corporation of Bonsecours*,[263] where the question arose as to the right of the Quebec legislature to require a ditch belonging to the railway company, and running along the side of the railway track of the company on the lands of the company for the purpose of their railway, to be kept in good order and free from obstruction which would impede the water-flow. Their lordships say (pp. 372-3): " The British North America Act, whilst it gives the legislative control of the appellants' railway, *qua* railway, to the parliament of the Dominion, does not declare that the railway shall cease to be part of the province in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly the parliament of Canada has, in the opinion of their lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, *inter alia,* reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes. It was obviously in the contemplation of the Act of 1867 that the railway legislation, strictly so called, applicable to those lines which were placed under its charge, should belong to the Dominion parliament. It, therefore, appears to their lordships that any attempt by the legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works, would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of its becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company" (*i.e.,* the Canadian Pacific R. W. Co.), "then the enactment would, in their lordships' opinion, be a piece of municipal legislation competent to the legislature of Quebec:" and they read the enactment, or rather the notification to the railway given under it, as embracing the latter purpose only.[264]

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[262] In *Bourgoin* v. *La Campagnie du Chemin de Fer de Montreal* (1880), 5 App. Cas. 381, the Privy Council held that the provincial legislature had no power to ratify and validate the transfer of a federal railway, with its property, liabilities, rights, and powers to the Quebec government, and through it to a company with a new title and a different organization, to be governed by and subject to provincial legislation; but that ratification by a Dominion Act was necessary. They held so both on the general law of England and of Quebec, under which an Act of parliament would be required to validate such a transfer, and upon the special provisions of the British North America Act.

[263] [1899] A. C. 367, see esp. at p 373. Reported below, R. J. Q. 7 Q. B. 121.

Cattle protection.—But immediately after this decision, in *Madden* v. *Nelson and Fort Sheppard R. W. Co.*,[265] the Board held that the provisions of the British Columbia Cattle Protection Act that a Dominion railway company, unless they erected proper fences on their railway, should be responsible for cattle injured or killed thereon, was *ultra vires* of the provincial legislature, and say: " Their lordships think it unnecessary to do more than to say that in this case the line seems to have been drawn with sufficient precision in the case of the *Canadian Pacific R. W. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours,*[265a] when it was decided that, although any direction of the provincial legislature to create new works on the railway, and make a new drain, and to alter its construction, would be beyond the jurisdiction of the provincial legislature, the railway company were not exempted from the municipal state of the law as it then existed, that all landowners, including the railway company, should clean out their ditches so as to prevent a nuisance. It is not necessary to do more here than to say that this case raises no such question anywhere near the line, because in this case there is the actual provision that there shall be a liability on the railway company unless they create such and such works upon their roadway. This is manifestly and clearly beyond the jurisdiction of the provincial legislature."

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[264] See, following this decision, *Grand Trunk R. W. Co.* v. *Therrien* (1900), 30 S. C. R. 485, where the Supreme Court held that the provincial legislatures have no jurisdiction to make regulations in respect to crossings, or the structural condition of the roadbed of railways subject to the provisions of the Railway Act of Canada. See per Sedgewick, J., at p. 492; also, *Rex* v. *Canadian Pacific R. W. Co.* (1905), 1 W. L. R. 89, where the Supreme Court of the North-West Territories held *intra vires* as applied to the defendant railway, the provisions of the Prairie Fire Ordinance respecting fires caused by sparks from an engine. So in *Grant* v. *Canadian Pacific R. W. Co.* (1904), 36 N. B. 528, it was held that certain provincial enactments against starting fires near any forests or woodlands between May 1st and Dec. 1st in any year were *intra vires* and applied to the defendant railway, McLeod, J., saying (p. 545):—"These sections do not seek to control the company in the management of its railway in any way. They are simply for the protection of the property in New Brunswick against damage by fire." In *Monkhouse* v. *Grand Trunk R. W. Co.* (1883), 8 O. A. R. 637, Spragge, C., held that an Ontario Act providing for the safety of railway employees and the public by regulating the construction and maintenance of railway frogs would be *ultra vires* if intended to apply to a Dominion railway. See, also, *Washington* v. *Grand Trunk R. W. Co.* (1897), 24 O. A. R. 183, per Osler, J.A., at pp. 185-6, and Legislative Power in Canada, p. 596, n. 1.

[265] [1899] A. C. 626. Reported below, 5 B. C. 541. In *In re Railway Act* (1905), 36 S. C. R. 136, noted *supra*, p. 348, Davies, J., at pp. 146-7, refers to these two Privy Council decisions, saying that they "throw much light upon the view which the Judicial Committee of the Privy Council take as to the necessity of excluding the provinces from interfering by legislation in a matter wholly withdrawn from them, and, inferentially, show how broad should be the construction placed upon the powers of the Dominion in a matter exclusively relegated to it to legislate upon."

Fire protection.—In connection with these two Privy Council decisions is to be also noted *Canadian Pacific R. W. Co.* v. *The King,*[266] where the Supreme Court (Idington, J., dissenting) held *ultra vires* as applied to the defendants, certain North-West Territories Ordinances, which prescribed penalties for kindling a fire, and letting it run at large on land of another person, but provided that there should be no liability under the Act in the case of a party in charge of a railway locomotive engine, if the same were equipped with a suitable smoke stack, and if, in the case of a line of railway passing through prairie country, it was protected by a fire-guard of ploughed land. It was conceded that the legislature of the North-West Territories had no greater jurisdiction than a provincial legislature, and the Court put their decision upon the ground that the provision as to fire-guards was imposing a duty upon companies operating railways under the legislative control of the Dominion, which no Dominion enactment imposed. They say:—"It is an enactment prescribing the maintenance of such fire-guards as adjuncts to Dominion railway lines as a condition of the lawful operation of them in the localities to which it applies; and, therefore, an enactment professing to regulate the working (if not the construction) of such lines; and consequently within Lord Watson's words, "railway legislation strictly so called.'"[267] In his dissenting judgment Idington, J., says: "It seems to me all to resolve itself into a question of the right of the local legislature to enact laws, tending to protect property against the dangers of a local nature, arising from that negligence which the Dominion parliament never sanctioned, nor intended to sanction, nor legislated as to. . . Can a Dominion railway company in the negligent doing of the work of building, and running, or both, befoul the streams, pollute the air, endanger life and property, and destroy everything in its path, regardless of all those local regulations that bind every person, and every other corporate body, in a province.'"[268]

[265a] *Supra,* p. 356.

[266] (1907) 39 S. C. R. 476.

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[267] *Sc.* in *Canadian Pacific R. W. Co.* v. *Bonsecours,* [1899] A. C. 367, at pp. 372-3.

Mechanics and wage earners' liens. — In *Crawford* v. *Tilden*,[269] it was held that a lien under the Ontario Mechanics and Wage Earners Lien Act cannot be enforced against the railway of a company incorporated under a Dominion Act, and declared thereby to be a work for the general advantage of Canada.

Sequestration and receivers.—In *Baie des Chaleurs R. W. Co.* v. *Nantel*,[270] the majority of the Quebec Court of Queen's Bench held that a provincial statute which provided for the sequestration of the property of a railway company subsidized by the province, when such company was insolvent, or had not complied with its charter, or had ceased to work its road, and for the maintenance and management of it by the sequestrator, and, if necessary, a sale by the sheriff under the order of the Court, was *intra vires* as applied to a Dominion railway, being merely one of procedure in order to obtain a judicial sale, there being no Dominion law providing for the liquidation of such insolvent railways. And so, also, in *Wile* v. *Bruce Mines R. W. Co.*,[271] Meredith, C.J., held that the High Court of Justice has power to appoint a receiver of a federal railway, at the instance of a creditor of the railway company, if there be no federal legislation providing otherwise, but adds: "I do not wish to be understood as expressing any opinion as to the power of the parliament of Canada, in the case of a railway under its jurisdiction, to take away the power of the provincial Courts to exercise the jurisdiction I am exercising in this case."

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[268] See pp. 488, 490-5. A report of the Minister of Justice of October 29th, 1904, in reference to an Ontario Act respecting aid to certain railways, suggests that many things which a provincial legislature could not impose as statutory requirements upon a federal railway—such as that the location of the line should be subject to the approval of the Railway Committee of the Executive Council of the province; that rates for passengers and freight should be subject to the approval of the said Committee; that there should be no special rates, rebates, drawbacks or concessions to favourite shippers, etc.—it might secure as matter of agreement between the local government and the company as a condition to the grant of a subsidy. *Cf.* as to a provincial legislature imposing Sunday observance conditions, when incorporating a provincial railway: *Kerley* v. *London and Lake Erie Transportation Co.* (1912), 26 O. L. R. 588; *infra*, pp. 455-7.

[269] (1907) 14 O. L. R. 572, 13 O. L. R. 169. And *cf.*, also, *Larsen* v. *Nelson and Fort Sheppard R. W. Co.* (1895), 4 B. C. 151.

[270] (1896) R. J. Q. 9 S. C. 47, 5 Q. B. 65. As to the sale of a Dominion railway under a writ of *fi. fa.*, see *Redfield* v. *Corporation of Wickham* (1888), 13 App. Cas. 467.

Sunday observance.—In *In re Lord's Day Act of Ontario,*[272] the question was submitted to the Ontario Court of Appeal by the Lieutenant-Governor in Council, pursuant to the provincial Act in that behalf, as to whether the province had power to prohibit Sunday work upon lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings to which the exclusive legislative authority of the Dominion extends under the British North America Act, which of course includes works which, although wholly situate within the province, have been, before or after their execution, declared by the Dominion parliament to be for the general advantage of Canada, or for the advantage of two or more of the provinces. The Court unanimously answered this question in the negative, Osler, J.A., and Moss, J.A., expressly, however, reserving the right to reconsider the matter, save so far as covered by authority, should it thereafter arise in the course of actual litigation. They none of them give any reasons, except that Armour, C.J.O., rests his judgment apparently upon the fact that, in his opinion, " the profanation of the Lord's day is an offence against religion, and offences against religion are properly classed under the limitation ' crimes '; " and consequently belongs to the Dominion parliament under No. 27 of section 91 of the British North America Act.[273] On appeal to the Privy Council,[274] their lordships stated that as they held that the provincial Act before them treated as a whole was criminal legislation, it was not necessary to answer the above question; although Boyd, C., in *Kerley* v. *London and Lake Erie Transportation Co.*,[275] says that he understands them as thus affirming the view expressed by the Ontario judges. In this last case it was by virtue of express Dominion enactment, as construed by the Court, that the provincial legislation was made to affect a federal railway.

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[271] (1906) 11 O. L. R. 200.

[272] (1902) 1 O. W. R. 312.

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[273] As to this, see *supra*, p. 321; *infra*, pp. 394-612.

[274] [1903] A. C. 524, *sub nom. Attorney-General for Ontario* v. *Hamilton Street R. W. Co.*

[275] (1912) 26 O. L. R. 588. See as to this case also, *infra*, pp. 455-7.

Declaration by Dominion parliament that Works, wholly situate in one province, are for the general advantage of Canada, or of two or more of the provinces.—As the Privy Council state in *City of Montreal* v. *Montreal Street Railway,*[276] when such a declaration is made, the railway to which it refers is withdrawn from the jurisdiction of the provincial legislature, and passes under the exclusive jurisdiction and control of the parliament of Canada, and, small and provincial though it may be, stands to the latter in precisely the same relation, as far as legislative power is concerned, as do those great trunk lines, also federal railways, which traverse the Dominion from sea to sea, and were originally constructed, and are now worked, in exercise of the powers conferred by the statutes of the parliament of Canada. But in *City of Toronto* v. *Bell Telephone Co.*,[277] Street, J., says: " Where a company has been carrying on works in a province under a provincial Act of incorporation, if the Dominion parliament simply declares its works to be for the general advantage of Canada without more, the result is that the company continues to work under the provincial Acts until they are altered or amended by Dominion legislation; the provincial Acts are not repealed by the mere fact that the company has come under the jurisdiction of the Dominion parliament. However, in *Attorney-General of British Columbia* v. *Vancouver, etc., Railway and Navigation Co.*,[278] a provincial railway, which had been declared to be for the general advantage of Canada, was held not liable to actions by the provincial attorney-general, under the provincial Crown Franchises Regulation Act, whereby the provincial attorney-general was authorized to bring an action against any corporation, contravening or offending against its Act of incorporation, or misusing a franchise or privilege conferred upon it by law. Irving, J., held that the Act could not authorize the provincial attorney-general to commence an action for the cancellation of its charter against a company which by Dominion legislation had been removed from the status of a provincial company, and had become, in effect, a Dominion company. And so, after such a declaration, any power of the company to acquire land for branch lines must be exercised in accordance with the Dominion Railway Act.[279]

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[276] [1912] A. C. at p. 339. Their lordships in this case indicate that it is proper for such declaration to be made when the circumstances of a provincial railway are such "as to affect the body politic of the Dominion." See the passage quoted *supra*, p. 174. The opinion had been expressed by some judges that such declaration can only be made by the Dominion parliament after the Work referred to has been completed: so per Burton, J.A., in *McArthur* v. *Northern Pacific Junction R. W. Co.* (1890), 17 O. A. R. 86, at pp. 112-3; per Street, J., in *City of Toronto* v. *Bell Telephone Co.* (1902), 3 O. L. R. 465, at pp. 470-1. But a contrary view was expressed per Moss, C.J.O., S. C. 6 O. L. R. at p. 339; per Garrow, J.A., at pp. 342-3; per Maclennan, J.A., at p. 348; and the Privy Council definitely over-ruled the contention: S. C. [1905] A. C. at p. 58. Note the words 'before or after their execution' in No. 10 (c) of section 92.

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[277] (1902) 3 O. L. R. at pp. 473-4.

[278] (1902) 9 B. C. 338.

Must such declaration be express, or can it be implied?—It would seem that in the opinion of James, J., as expressed in *Windsor and Annapolis R. W. Co.* v. *Western Counties R. W. Co.*,[280] such a declaration may be implied in a Dominion Act, though not made in express words. But in *Re Grand Junction R. W. Co.* v. *County of Peterborough,*[281] three judges express the view that such declaration must be made in express words.[282] In *Hewson* v. *Ontario Power Co.*,[283] Britton, J., asks the express question: "May there not be a declaration by implication, or, so far as all parties interested are concerned, what would amount to a declaration?" and seems to imply that, in his opinion, there might be, though that was not a case of mere implication as there was a distinct statement in the preamble of one of the Acts in question. He adds: "Legislation by the Dominion subsequent to the Act of incorporation, and as to some of the Acts subsequent to some work being done, is a matter fairly to be considered, if we can look for a declaration apart from the express words of the statute." On appeal, however, to the Supreme Court, Davies, J., with whose reasons Sedgewick, J., concurred

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[279] *In re Columbia and Western R. W. Co. and The Railway Acts* (1901), 8 B. C. 415.

[280] (1878) 3 R. & C. at p. 415. See Legislative Power in Canada, at pp. 601-606.

[281] (1880) 45 U. C. R. 302, 6 O. A. R. 339.

[282] *I.e.*, Cameron, J., 45 U. C. R. at pp. 316-7; Burton, J.A., 6 O. A. R. at p. 341; Patterson, J.A., *ibid.*, at p. 349.

[283] (1905) 6 O. L. R. at p. 16.

(Girouard and Idington, JJ., *contra*), expressed the view that a recital in the preamble of a special private Act enacted by the parliament of Canada to the effect that it was desirable ‘ for the general advantage of Canada ’ that the company should be incorporated, is not such a declaration as that contemplated by No. 10 (c) of section 92 of the British North America Act, in order to bring the subject-matter of the legislation within the jurisdiction of Parliament.[284]

Davies, J., says (p. 605): “ In my present view . . . the declaration intended was an enacting declaration to the effect required by the Imperial Act. Such a declaration is not, I think, one which might be spelled out of the charter granted, or inferred merely from its terms, or declared from recitals of the promoters in the preamble, but one substantially enacted by Parliament.” But the Court held that when the subject-matter of legislation by the parliament of Canada, although situate wholly within a province, is obviously beyond the powers of the local legislature, there is no necessity for an enacting clause specially declaring the works to be for the general advantage of Canada, or for the advantage of two or more of the provinces.[285]

In a report of November 14th, 1899, the Minister of Justice objected to a number of British Columbia Acts incorporating railway companies, because they each of them contained a provision that, in case at any time the railway was declared by the parliament of Canada to be a work for the general advantage of Canada, then all powers and privileges granted by the Act of incorporation of the company, or by the British Columbia Railway Act, should thereupon cease and determine. He considers, however, that these provisions, though improper, are harmless, and " were it possible that they could have any effect, the whole matter would be within the authority of Parliament, upon its declaring the work for the general benefit of Canada, so that Parliament might re-enact or confirm in each case the very provisions which the legislature says are to cease and determine."[286]

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[284] (1905) 36 S. C. R. 596. Held, *aliter*, by the Court of Appeal for Ontario, and by Britton, J., the trial judge: 6 O. L. R. 11, 8 O. L. R. 88.

[285] And so per Britton, J., 6 O. L. R. 11.

In 1901 an interesting point was raised in the department of justice, as to how far, if at all, after a railway has become subject to Dominion control, its assets can be impaired to the detriment of the holders of its securities, at the will of the local legislature. The provincial legislature, after a provincial railway had been declared a work for the general advantage of Canada, and reincorporated as a Dominion railway, sought to impose a charge by way of royalty upon certain lands previously granted to it under a provincial Act, or upon the timber cut thereon. In a report, however, of May 16th, 1902, the Minister of Justice " concluded that, inasmuch as it is competent to the legislatures to tax the property of Dominion corporations, and inasmuch as the Act respecting these railway land grants, if not declaratory, is a taxing Act, it would not be proper . . on that account to exercise the power of disallowance."[287]

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[286] Provincial Legislation, 1899-1900, p. 106.

In 1901, also, the British Columbia legislature, which seems to be especially bold in legislative experiments, provided in several Acts incorporating railways that such Acts should not come into force until such time as the companies gave security that the Lieutenant-Governor in Council should have the right to fix the maximum rates to be charged for freight and passenger traffic, and that in the event of Dominion legislation bringing the railway company under the exclusive jurisdiction of the parliament of Canada, the foregoing conditions should be carried out by the company so incorporated, as a contract and obligation of such company, prior to any charge thereon. In a report of December 27th, 1901, the Minister of Justice says: "In so far as it is attempted to follow these companies into Dominion jurisdiction, and govern them by provincial enactment intended to come into effect after they have passed beyond the authority of the province, the legislation can, in the opinion of the undersigned, have no effect . . If, at any time, railways should fall within the exclusive jurisdiction of Parliament, previously existing enactments with regard to them can have effect only so far as Parliament intends." He, therefore, abstains from recommending disallowance. The Acts were, however, disallowed on another ground, namely, that they provided, also, that no aliens should be employed upon the railways during construction.[288]

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[287] Provincial Legislation, 1901-1903, p. 57.

[288] Provincial Legislation, 1901-1903, p. 63. See *supra*, p. 312.

In 1907 the Ontario legislature endeavoured to restrain the Dominion parliament in exercising its power to make a declaration under No. 29 of section 91, by providing that if the undertaking of any Ontario company operating a public utility, defined as meaning gas-works, waterworks, light and power works, etc., were so declared to be a work for the general advantage of Canada, and so brought under Dominion jurisdiction, the Lieutenant-Governor in Council might declare that all or any of the powers, rights, privileges and franchises, or claim to subsidies, conferred upon that company by provincial Act or charter should be forfeited, and that, thereupon, they should cease and determine, as should, also, any right, privilege, or franchise, or any claim to any bonus, or other aid, granted by by-law or agreement of any municipality. In a report of April 21st, 1908, Sir Allen Aylesworth, as Minister of Justice, points out that, if this legislation should ever be of any effect, action could never be taken under it by the Lieutenant-Governor in Council till after the company to be struck at had been completely withdrawn from provincial jurisdiction by reason of such a declaration having been made by Parliament, when such action would be necessarily wholly inoperative, and set at naught by the Courts; and, in any event, Parliament could at once re-enact and confirm, in each case, the very provisions which the Lieutenant-Governor in Council had declared were to cease and determine; and that, in fine, the legislation was so plainly ineffective and harmless that it did not call for any action by the Governor-General or for further notice.[289]

Dominion corporations generally.—As has been already stated, the power of the Dominion parliament to incorporate companies is not based exclusively on No. 29 of section 91, or on any other of its enumerated powers. It can incorporate companies by virtue of its general residuary power to make laws for the peace, order, and good government of Canada; but as this residuary power can only be exercised in relation to matters not coming within the classes of subjects assigned by the British North America Act exclusively to the legislatures of the provinces, no Dominion incorporation under it can give the company incorporated exemption or immunity from provincial laws.[290] Thus in *Colonial Building and Investment Association* v. *Attorney-General of Quebec*,[291] the Privy Council say of such a corporation: " What the Act of incorporation has done is to create a legal and artificial person, with capacity to carry on certain kinds of business, which are defined, within a defined area, namely, throughout the Dominion.[292] Among other things, it has given to the Association power to deal in lands and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land. If the company can so acquire and hold it, the Act of incorporation gives it capacity to do so.''[293] And so in *Citizens Insurance Co.* v. *Parsons*,[294] their lordships say that such a company, with power to purchase and hold lands throughout Canada in mortmain, could not do so in a province where a law against holding land in mortmain prevailed.[295] Although, therefore, the Dominion parliament can give a corporation it is creating any powers and functions it likes, outside ' provincial objects ' within the meaning of No. 11 of section 92 of the British North America Act,[296] it can only regulate its exercise of civil rights in respect to the classes of subjects enumerated in section 91.

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[289] Provincial Legislation, 1899-1900, p. 106. On July 13th, 1903, Mr. Borden, in the House of Commons, in reference to a Bill to remove a certain British Columbia railway from the jurisdiction of the province to that of the Dominion under the clause in question, (10 (c) of section 92, read in connection with No. 29 of section 91), called attention to the abuse of that clause, "which was being used to bring railways, in a wholesale way, under Dominion jurisdiction, in a manner quite contrary to previous professions of the Dominion Government." See, further, Legislative Power in Canada, p. 603, n. 2.

[290] See *supra*, pp. 342-3; and *Citizens Insurance Co.* v. *Parsons* (1881), 7 App. Cas. at pp. 116-7. Similarly Dominion laws are binding on foreign and provincial corporations carrying on business in Canada, as much as on Dominion corporations.

[291] (1883) 9 App. Cas. at pp. 165-6. This case is commented on at length by Duff, J., in *Canadian Pacific R. W. Co.* v. *Ottawa Fire Insurance Co.* (1907), 39 S. C. R. at pp. 463-8.

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[292] See Story on the Constitution of the United States, 5th ed., vol. 2, p. 153, quoted Legislative Power in Canada, p. 627, n. 2. And cf. per Idington, J., in *Canadian Pacific R. W. Co.*, v. *Ottawa Fire Ins. Co.* (1907), 39 S. C. R. at p. 442.

[293] And so *cf. Cooper* v. *McIndoe* (1887), 32 L. C. J. 210; *Waterous Engine Works Co.* v. *Okanagan Lumber Co.* (1908), 14 B. C. R. 238. See, also, per Newlands, J., in *Rex* v. *Massey-Harris Co.* (1905), 6 Terr. L. R. at pp. 133-134.

[294] (1881) 7 App. Cas. at p. 117.

[295] As to provincial laws requiring a license from the Crown in such cases, it is submitted, in view of *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A. C. 437, that notwithstanding what is said in *McDiarmid* v. *Hughes* (1888), 16 O. R. 570, the Dominion could not dispense with a company incorporated by it obtaining such a provincial license, unless incidentally to the exercise of one of its enumerated powers, such as the power assigned to it to regulate banking as well as incorporate a bank: see Legislative Power in Canada, pp. 621-2.

Extra-provincial companies licensing Acts.—Notwithstanding the judgments of the Privy Council in *Citizens Insurance Co.* v. *Parsons,*[297] and *Colonial Building and Investment Association* v. *Attorney-General of Quebec,*[298] just referred to, and notwithstanding, it may be added, their subsequent judgment in *Bank of Toronto* v. *Lambe,*[299] which will be more particularly noticed in reference to the provincial power of taxation under No. 2 of section 92, Ministers of Justice have constantly objected to provincial Acts imposing the necessity upon any companies incorporated under the laws of the United Kingdom, or of the Dominion, of taking out a provincial license before doing business in the province; and when such Acts have contained express prohibitory provisions forbidding the doing of business without obtaining such license, they have sometimes been disallowed, the ground being distinctly taken, until lately, that they are *ultra vires,* although other grounds of objection to them are also assigned.[300] But, although discrimination against Dominion corporations may be a good ground for disallowance (and as the references in the last footnote shew, the provincial governments seem to admit as much), it is submitted that a tax by way of license being, as the Privy Council have decided in *Brewers and Maltsters Association of Ontario* v. *Attorney-*

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[296] See *infra,* pp. 461-487.

[297] (1881) 7 App. Cas. 96.

[298] (1883) 9 App. Cas. 157.

[299] (1887) 12 App. Cas. 575. See *infra,* p. 394.

[300] Several examples are mentioned in Legislative Power in Canada, pp. 623-6, *q.v.* The whole subject of provincial power to require extra-provincial companies, Dominion and other, to take out licenses before doing business in the provinces is discussed in reports of the Minister of Justice of November 22nd, 1900, and

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May 3rd, 1901, in connection with the Ontario Act in that regard, 63 Vict. c. 24: Provincial Legislation, 1899-1900, pp. 11-14, 19-23, 36-41. Speaking of Dominion companies, the Minister says:—"Such a company has capacity, within the scope of its charter, to trade within the provinces and elsewhere in the Dominion, just as an individual has. An enactment by a province forbidding residents of, or persons doing business in, any other province to trade in the first named province would seem to affect more than provincial trade. It would be a matter of interprovincial concern, and, therefore, *ultra vires* as relating to the regulation of trade and commerce; otherwise all interprovincial trade, which the Judicial Committee holds that the Dominion has the right to regulate, could be rendered impossible by the provinces." But, with deference, it is submitted that the crucial point must be whether the provincial Acts in question are, properly regarded, Acts prohibiting such Dominion companies from trading within the province, or are simply Acts requiring them to take out a provincial license before they do so, which is a very different thing. So far as, in his report of May 3rd, 1901, the Minister objected to the Ontario legislation on the ground that it amounted to discriminating taxation on the part of the province against Dominion companies, the Ontario Government conceded the point, under threat of disallowance, and agreed to amend so as to establish equality in regard to license fees and taxation between Dominion and provincial companies. See, also, the further report of the Minister of Justice of June 20th, 1904, and that of the provincial Attorney-General of August 4th, 1904, who, while conceding that there should be no discrimination against Dominion companies, nevertheless says:—"There should be some definition of companies chartered for Dominion as distinguished from provincial objects (see *infra*, pp. 464-479). It should not be left to the whim of the applicant, who may say in his petition, no matter how entirely local or how strictly provincial his proposed company may be—that he seeks incorporation of a company with 'Dominion objects.' It is very much like the case of a short line of railway between two towns in the interior of the province being declared 'a work for the general benefit of Canada:'"

General of Ontario,[301] direct taxation, it is unquestionable that the provincial legislature have the right so to tax Dominion or any other corporations;[362] and of late (see pp. 379, 421-2 *infra*), Ministers of Justice have ceased to dispute that. And so in *English* v. *O'Neill,*[303] it was held that the provision in the Ordinance incorporating the City of Calgary, empowering the City to pass by-laws for controlling, regulating, and licensing insurance companies, offices, and agents, and collecting license fees for the same, was *intra vires* to authorize a by-law imposing licenses on insurance agents doing business for insurance companies licensed under Dominion Acts. And, in like manner, in *Rex* v. *Massey-Harris Co.,*[304] the Court held the Foreign Com-

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Provincial Legislation, 1901-3, pp. 21-24. See, also, the report of Sir Allen Aylesworth, as Minister of Justice, of March 14th, 1911, upon an Ontario Act in reference to licensing extra-provincial companies, objecting that Dominion corporations were discriminated against, where the Ontario Government acquiesced in the propriety of the objection. See, also, Provincial Legislation, 1901-3, pp. 65-66, 74-75, and 1904-5, p. 154, in the case of British Columbia legislation; *ibid.*, pp. 103-4, 107-111, in the case of North-West Territories Ordinances, where, in a report of December 21st, 1901, the Minister of Justice expressly declares that he "does not deny to the legislatures power of taxation." Ultimately the Ordinances were vetoed by the Dominion Government. As to what constitutes carrying on business by a foreign company in a province, see *Standard Ideal Co.* v. *Standard Sanitary Manufacturing Co.*, [1911] A. C. 78, 83-4.

[301] [1897] A. C. 231. See *infra*, pp. 394-6.

[302] See *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575; *Rex* v. *Neiderstadt* (1905), 11 B. C. 347; *City of Halifax* v. *Western Assurance Co.* (1885), 18 N. S. 387; *City of Halifax* v. *Jones* (1896), 28 N. S. 454; *Waterous Engine Co.* v. *Okanagan Lumber Co.* (1908), 14 B. C. R. 238, followed *John Deere Plow Co.* v. *Agnew* (1912), 8 D. L. R. 65.

[303] (1899) 4 Terr L. R. 74.

[304] (1905) 6 Terr. L. R. 126.

panies Ordinance, 1903, *intra vires,* so far as it assumed to directly tax a company incorporated under the Dominion Companies Act with power to carry on the business of manufacturing and dealing in all classes of agricultural implements throughout the whole Dominion. But the Court says (p. 129) that possibly the Ordinance had, in some respects, gone further than it is necessary for a taxing Ordinance to go, " and may contain provisions that are at variance and inconsistent with the Dominion Companies Act, or with the rights and privileges conferred by virtue of it, and unnecessarily, so far as the purpose of taxing is concerned, impose duties of an onerous character not contemplated by the Act. If it does contain such provisions, and if the procedure prescribed is of such a character that these duties have to be performed before the tax can be received, or become payable, and the company is prohibited from doing business unless the tax is paid, the ordinance may, *quoad* such companies, be *ultra vires.*" *Sed quaere* as to such a company as the Massey-Harris Company, which is not within No. 29 of section 91, read in connection with No. 10 of section 92, nor within any of the other enumerated clauses of section 91.

Again, in *International Text Book Co.* v. *Brown,*[305] it was held that the Ontario Act for licensing extra-provincial corporations is *intra vires* as coming within No. 2 of section 92 of the British North America Act, being a mode of direct taxation within the province, or as relating to the issuing of licenses in order to the raising of a revenue under No. 9 of that section.

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[305] (1907) 13 O. L. R. 644.

Other provincial attempts to interfere with the business of Dominion corporations.—We may, again, mention in this connection the case of *La Cie. Hydraulique St. Francois* v. *Continental Heat and Light Co.,*[305a] where the Privy Council held that the power conferred by a provincial legislature on an industrial company in the incorporating Act to carry on its corporate enterprise to the exclusion of every other company, in a designated territory is without effect against a company constituted for similar ends by a previous statute of the parliament of Canada, the latter incorporation, however, it must be remembered being, not under the residuary Dominion power, but under an enumerated Dominion power, viz., No. 29, of section 91. See *supra,* pp. 342-3. In a report of January 12th, 1900, the Minister of Justice objected to a provision in a British Columbia Act, entitled the Placer Mining Amendment Act, 1899, to the effect that no joint stock company or corporation should be entitled to take out a free miner's certificate unless the same had been incorporated, and not simply licensed or registered under the laws of the province, upon the ground that it had the effect of entirely excluding companies incorporated by the parliament of Canada, and seemed directly to affect the regulation of trade and commerce, or other matters within the authority of Parliament, rather than any matter within exclusive provincial control. These objections being submitted to the provincial authorities, the latter contended that the provision was *intra vires* as affecting the public property in the province. The Act was, however, disallowed, on the recommendation of the Minister of Justice, in a further report of April 12th, 1900, partly on the above grounds, and partly because the Act contained certain provisions affecting aliens which were deemed also *ultra vires.*[306]

[305a] [1909] A. C. 194. See as to this case *supra*, p. 125.

In the same year the Minister had occasion to consider a British Columbia Act relating to extra-provincial investment and loan Societies which required such Societies, when not incorporated in the province, to obtain a license from the local authorities to carry on business within the province, and when licensed, to deposit their securities with the provincial Minister of Finance; and provided that such Society might collect its interest and dividends upon such securities so long as it remained solvent, and faithfully complied with the provisions of the Act, and of the contracts entered into by it with the province; and that any Act for the time being in force in the province relating to the winding-up of companies should apply to Societies licensed under the Act, and that upon the appointment of a liquidator of any such Society under any such Act, the securities deposited with the Minister of Finance should be immediately handed over to the liquidator for the benefit of the creditors and members of the Society within the province, to be realized and distributed amongst them in accordance with the laws of the province. The Minister of Justice, in a report of December 27th, 1900, remarks of this Act: "It is very likely true that a provincial legislature has authority to tax Dominion corporations, and to raise such taxes by means of license fees. This statute might possibly be supported as a taxing Act under one or other of these powers, were it not that it attempts to compel extra-provincial Societies of the character described to procure licenses under the Act, and thereupon to make these Societies subject to the provisions above referred to, which impose obligations and liabilities upon the Societies which presumably would not be authorized, or provided for, by their constituting Acts. There is a suggestion, also, that the business of the company is to depend upon its solvency, and that its business may be stopped, and its property dealt with by the local authorities in the event of insolvency. These provisions cannot be upheld under any authority vested in the province to tax or raise revenue by means of licenses; and they are, in the opinion of the undersigned, *ultra vires* as affecting the regulation of trade and commerce,[307] bankruptcy and insolvency, and other matters within the exclusive control of Parliament." The matter, however, was settled by the provincial legislature repealing the objectionable sections.[308]

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[306] Provincial Legislation, 1899-1900, at pp. 123-4.

Again, by report of September 27th, 1907, Sir Allen Aylesworth, Minister of Justice, strenuously objected to a Nova Scotia Act of 1906, relating to loan companies, in so far as it affected companies incorporated by the Dominion parliament, and assumed to hypothecate a particular body of securities for the exclusive benefit of shareholders residing within the province, and to legislate certain shareholders within the province into a privileged and preferential position in public companies as compared with shareholders in other provinces. He took the ground that the legislation was an interference with the constitution of Dominion loan companies incompetent to a local legislature, or, if competent, an interference which could not be permitted consistently with the policy of the Dominion in incorporating and defining the powers of such companies, and the relations between them and their shareholders. He threatened disallowance unless the objectionable provisions were repealed, which the provincial Government refused to undertake. No further action was, however, in fact, taken by the Dominion Government.

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[307] As to this *quære:* see *supra,* pp. 230-6.

[308] Provincial Legislation, 1899-1900, pp. 131-2, 142.

A very different question arose in connection with a New Brunswick Act of the same year, respecting telephone companies, which authorized expropriation of properties, rights, powers, and franchises, of any telephone company, or companies, in the province, and required every telephone company carrying on business in the province, and charging telephone tolls, to make certain returns, and enacted that the Lieutenant-Governor might appoint auditors to examine the books of the company, and readjust, and alter, or vary the tariffs. The Minister of Justice, by report of December 12th, 1907, says that such provisions are manifestly *ultra vires* so far as concerns companies incorporated by the Dominion, and that he assumes it is only intended to apply to local corporations. But it will, of course, be observed that here the reference is to companies incorporated under the express enumerated Dominion power No. 29 of section 91, read in connection with No. 10 (*a*) of section 92.

There remain certain points in connection with Dominion corporations generally which may perhaps be most conveniently dealt with here.

The Dominion parliament can alone incorporate companies with chartered powers to carry on business throughout the Dominion.—That the Dominion parliament has alone the right to create a corporation to carry on business throughout the Dominion is expressly stated by the Privy Council in *Citizens Insurance Co.* v. *Parsons,*[309] and in *Colonial Building and Investment Association* v. *Attorney-General of Quebec*[310] and is sufficiently obvious, seeing that provincial powers of incorporation are expressly confined, by No. 11 of section 92, to ' companies with provincial objects,' and whatever may be the precise import of these last words,[311] no such corporation could be said to serve only a provincial object.[312]

not since Bonanza Creek case.

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[309] (1881) 7 App. Cas. at p. 117.

[310] (1883) 9 App. Cas. at pp. 164-5.

[311] See *infra*, pp. 461-487.

[312] It is, of course, competent for the Dominion parliament to incorporate under Dominion charter the members of a provincial

A Dominion corporation may, however, confine its operations to one or more provinces.— Subject, of course, to any express requirements of their charter, or Act of incorporation, the fact that a company incorporated under a Dominion Act with power to carry on its business throughout the Dominion, chooses to confine the exercise of its powers to one province cannot affect its status or capacity as a corporation, if the Act incorporating the company was originally within the legislative power of the Dominion parliament. This is clearly laid down in the case of the *Colonial Building and Investment Association*,[313] just referred to. That Association had been incorporated with power to carry on its business, consisting of various kinds, throughout the Dominion. It was, however, contended that inasmuch as the Association had confined its operations to the province of Que-

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company, and so enlarge the scope of their operations and powers: Todd's Parliamentary Government in British Colonies, 2nd ed., at p. 437. As to whether the Dominion parliament can authorize the Governor-General in Council to permit a provincial company to transact business throughout the Dominion, or in foreign countries, see *infra*, pp. 483-5. Nevertheless, there may, no doubt, be objects for which only a provincial legislature could incorporate a company because of their necessarily provincial character: *Forsyth* v. *Bury* (1888), 15 S. C. R. 543, per Ritchie, C.J., at p. 549; per Strong, J., at p. 551; *Citizens' Insurance Co.* v. *Parsons* (1880), 4 S. C. R. at p. 310; Legislative Power in Canada, p. 375, n. 2; 634. It is questionable whether provincial legislatures can validly enlarge or affect the powers of a Dominion corporation. See the remarks of Sir Allen Aylesworth, in a report as Minister of Justice, dated March 30th, 1910, on a Nova Scotia Act of 1909 respecting the Victorian Order of Nurses for Canada, where he raises the question of the power of the provincial legislature to do this in the case of the Order, "which is incorporated by royal letters patent with general powers." *Cf.* per Maclennan, J.A.

[313] (1883) 9 App. Cas. 157.

bec, and its business had been of a local and private nature, it followed that its objects were local and provincial, and, consequently, that its incorporation belonged exclusively to the provincial legislature. Their lordships overruled this contention, laying down the above principle, and adding (p. 374): " The parliament of Canada could alone constitute a corporation with these powers; and the fact that the exercise of them has not been co-extensive with the grant, cannot operate to repeal the Act of incorporation, nor warrant the judgment prayed for, viz., that the company be declared illegally constituted." They, however, add (p. 165): " It is unnecessary to consider what remedy, if any, could be resorted to if the incorporation had been obtained from Parliament with a fraudulent object."[314] But whenever the objects of a company as defined by its Act of incorporation, contemplate possible extension beyond the limits of one province, it is within the exception of No. 10 (a) of section 92 of the British North America Act.[315]

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[314] Their Lordships refer to their holding in this case in *City of Toronto* v. *Bell Telephone Co.*, [1905] A. C. at p. 58. And see *supra*, pp. 76-82.

[315] Per Davies, J., in *Hewson* v. *Ontario Power Co.* (1905), 36 S. C. R. at p. 606.

CHAPTER XXV.

PROVINCIAL ENUMERATED POWERS.

1. The amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant-Governor.

The *non obstante* clause in this sub-section—which is to be found in none other of the sub-sections of section 92 of the British North America Act, is to be noticed, and to be reconciled with the *non obstante* clause in section 91, which states that 'notwithstanding anything in this Act, the exclusive legislative authority of the parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated.' Doubtless the earlier *non obstante* clause must dominate over the later;[1] so that we may, perhaps, state the true position thus: Under this sub-section of section 92, provincial legislatures have the same power to alter and amend the constitutions of their respective provinces (except as regards the office of Lieutenant-Governor), by their own legislative Act, as the Imperial parliament possessed at the date of the passing of the British North America Act; but, whilst the amendment of their own Constitution is conceded to the provinces, they might, as an unnecessary incident of amending their Constitution, enact some things which might be abrogated by a Dominion law.[1a] Otherwise, as Ramsay, J., says in *Ex parte Dansereau,*[2] No. 1 of section 92, in its widest sense, would amount to a power to upset the British North America Act,[2a]

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[1] The *non obstante* clause in section 91 must, it is submitted, be interpreted to mean 'notwithstanding anything hereinbefore or hereinafter enacted in this Act.'

The Lieutenant-Governor. — In *Attorney-General of Canada* v. *Attorney-General of Ontario,*[2b] Boyd C., speaking of this sub-section, "which forbids interference with the office of Lieutenant-Governor," says: "That veto is manifestly intended to keep intact the headship of provincial government, forming, as it does, the link of federal power; no essential change is possible in the constitutional position or functions of this chief officer, but that does not inhibit a statutory increase of duties germane to the office." And so in his published argument before the Court of Appeal in this case, Mr. Edward Blake said of this clause of the Federation Act:—" This means that those elements of the Constitution which can be properly deemed to be parts of the Constitution relating to the office of the Lieutenant-Governors are not to be changed; and for an obvious reason, because the Lieutenant-Governor is the link between the federal and the provincial, aye, and between the Imperial and the provincial authority; he is the means of communication, he is the chain and conduit of Imperial as well as federal connection; and, therefore, his office in the Constitution, his constitutional position as a federal officer, is not to be affected." And the Ontario Court of Appeal,[2c] and the majority of the Supreme Court of Canada,[2d] affirmed him in holding the Ontario Act there in question *intra vires,* though it purported to vest certain powers, authorities, and functions in the Lieutenant-Governor of Ontario, amongst others that of remitting sentences for offences against provincial penal statutes. In the latter Court, however, Gwynne, J., says:—" So to extend the powers, authorities, and functions of the Lieutenant-Governor of Ontario beyond those expressly vested in him by the Constitutional Act is, in my opinion, a violation of the terms of No. 1 of section 92 of the Act. . An Act which purports to vest in a Lieutenant-Governor of the province the royal prerogative in excess of so much thereof as is expressly or by necessary implication vested in him by the British North America Act must, I think, be held to be an alteration of the Constitution of the province as regards the office of Lieutenant-Governor." The other judges of the Supreme Court do not specially refer to this clause, Strong, C.J., and Fournier, J., resting their decision in favour of the Act upon its precautionary phrases—'So far as this legislature has power to enact,' etc., while Taschereau, J., simply refers to *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick.*[2e]

[1a] See Legislative Power in Canada, p. 699, n. 1, and p. 755, n. 1.

[2] (1875) 19 L. C. J. at pp. 224-5.

[2a] The Colonial Laws Validity Act, 1865—Imp. 28-29 Vict. c. 63—enacted in section 5:—

5. ' . . . Every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required, by any Act of parliament, letters patent, Order in Council, or colonial law for the time being in force in the colony.' As to the application of this section to a provincial legislature, see *Fielding* v. *Thomas*, [1896] A. C. 600, at p. 610. See also, as to it, per Sir J. W. Colvile, in *Doyle* v. *Falconer* (1866), L. R. 1 P. C. at p. 341; and Clement's Canadian Constitution, 2nd ed., pp. 249-50.

[2b] (1890) 20 O. R. 222, at p. 247.

[2c] 19 O. A. R. 31.

[2d] 23 S. C. R. 458.

Cannot abdicate functions.—Upon the argument before the Privy Council in *Hodge* v. *The Queen,*[3] Mr. Horace Davey contended that under this sub-section, provincial legislatures "could do what Lord Selborne, no doubt correctly, said in *The Queen* v. *Burah,*[4] the Indian legislature could not do,—abdicate their whole legislative functions in favour of another body." But, as Sir A. Hobhouse remarked,[5] this they cannot do. "They remain invested with a responsibility. Everything is done by them, and such officers as they create and give discretion to."[6]

[2e] [1892] A. C. 437. In a report, however, of Sir John Thompson, as Minister of Justice, dated July 16th, 1887, upon the Quebec Act of 1886, respecting the executive power, which declared the Lieutenant-Governor, or person administering the government of the provinces, to be a corporation sole, he says: "In the opinion of the undersigned, it is immaterial whether a legislature by an Act seeks to add to or take from the rights, powers, or authorities which, by virtue of his office, a Lieutenant-Governor exercises, in either case it is legislation respecting his office; and he recommended that the Act should be disallowed, and it was dissallowed accordingly: Hodgins' Prov. Legisl., 1867-1895, p. 338. See, further, as to the Lieutenant-Governors, *infra*, pp. 25-29.

[3] Dom. Sess. Pap. 1884, vol. 17, No. 30, p. 11.

[4] (1878) 3 App. Cas. at p. 905.

[5] Dom. Sess. Pap., *ibid.*, p. 70.

[6] See *supra*, pp. 74-5.

Can define their own privileges.—The Privy Council have held that under this sub-section, provincial legislatures have power to pass Acts for defining their own powers, immunities and privileges, in the sense which they make clear by saying: "It surely cannot be contended that the independence of the provincial legislature from outside interference, its protection, and the protection of its members from insult, while in the discharge of their duties, are not matters which may be classed as part of the Constitution of the province, or that legislation on such matters would not be aptly and properly described as part of the constitutional law of the province."[7]

Can refuse franchise to aliens.—In *Cunningham* v. *Tomey Homma,*[8] their lordships held that, notwithstanding the exclusive Dominion power to legislate in relation to 'naturalization and aliens,' a provincial Act enacting that no Japanese, whether naturalized or not, should have his name placed on the register of voters, or be entitled to vote at the elections for the provincial legislature, was *intra vires,* apparently under this sub-section.

2. Direct taxation within the Province in order to the raising of a revenue for provincial purposes.

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[7] *Fielding* v. *Thomas* [1896], at pp. 610-1. See Legislative Power in Canada, pp. 746-749.

[8] [1903] A. C. 151. Reported below, 7 B. C. 368, 8 B. C. 76. See *supra,* pp. 303-5.

General rule for testing validity of a provincial Act resting hereon.—In *Citizens Insurance Co.* v. *Parsons,*[9] the Privy Council point out that, ‘ the raising of money by any mode or system of taxation ’ is among the classes of subjects assigned by section 91[10] of the British North America Act to the Dominion parliament, and that the description is sufficiently large and general to include ‘ direct taxation within the province in order to the raising of a revenue for provincial purposes ’ here assigned to the provincial legislature, and that it obviously could not have been intended that the general power should override the particular one.[11] And so in the subsequent case of *Bank of Toronto* v. *Lambe,*[12] presently to be more particularly noticed, where the question before the Board was whether a certain Quebec Act entitled ‘ An Act to impose certain direct taxes on certain commercial corporations ’ was valid, their lordships say: “ To ascertain whether or not the tax is lawfully imposed, it will be best to follow the method of enquiry adopted in other cases. First, does it fall within the description of taxation allowed by class 2 of section 92 of the Federation Act, namely, ‘ direct taxation within the province in order to the raising of a revenue for provincial purposes?’ Secondly, if it does, are we compelled by anything in section 91, or in the other parts of the Act, so to cut down the full meaning of the words of section 92, that they shall not cover this tax?"[13] And in this connection it is necessary to bear in mind the essential distinction between regulation and taxation.[14] And so, in this case of *Bank of Toronto* v. *Lambe,* the Privy Council say (at p. 586), with reference to the Dominion power to regulate trade and commerce: "If they were to hold that this power of regulation prohibited any provincial taxation on the persons or things regulated, so far from restricting the expressions, as was found necessary in *Parsons'* case, they would be straining them to their widest conceivable extent." And on the same point, on the argument on the Liquor Prohibition Appeal, 1895,[15] when *Bank of Toronto* v. *Lambe* was referred to, Lord Watson asked: "Do you regulate a man when you tax him?" And Lord Herschell thereupon said: "May it not be necessary to regard it from this point of view, to find what is within regulation of trade and commerce, what is the object and scope of the legislation?[16] Is it some public object which incidentally involves some fetter on trade or commerce, or is it the dealing with trade and commerce for the purpose of regulating it? May it not be that, in the former case, it is not a regulation of trade and commerce, while in the latter it is, though in each case trade and commerce in a sense may be affected?" And Lord Watson then says: "It would be difficult to imply from these words 'the regulation of trade and commerce,' whilst the power of direct taxation is given to the province—the clauses must be read reasonably together—it would be difficult to suppose that regulating commerce meant the passing of an Act by the Dominion legislature exempting banks from provincial taxation, for practically that is what the argument in that case" (*sc. Bank of Toronto* v. *Lambe*), "had to come to; that under the words 'regulating commerce' was implied a power of exempting a bank from provincial taxation, or the liability to be taxed by the provincial parliament."[17]

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[9] (1881) 7 App. Cas. at p. 108.

[10] No. 3.

[11] See *supra*, pp. 112-118; 315-6.

[12] (1887) 12 App. Cas. 575, at p. 581.

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[13] See, also, as to the concurrent power of taxation between the Dominion parliament and the provincial legislatures: *Attorney-General of the Dominion* v. *Attorney-General of the Provinces* (*The Fisheries* case), [1898] A. C. 700, at pp. 713-714; per Strong, J., in *Severn* v. *The Queen* (1878), 2 S. C. R. at p. 111; per Dorion, C.J., in *Dobie* v. *The Temporalities Board* (1880), 3 L. N. at p. 254; the argument before the Supreme Court upon the Dominion Liquor License Acts, 1883-4; Dom. Sess. Pap. 1885, No. 85, at p. 98; Todd's Parl. Gov. in Brit. Col., 2nd ed., at p. 564.

[14] See *Weiler* v. *Richards* (1890), 26 C. L. J. N. S. 338.

[15] [1896] A. C. 348.

[16] See *supra*, pp. 230-6.

Plenary powers in matters of taxation.—And before passing on to a more particular discussion of the provincial power of taxation under this sub-section, it is worth while to observe that, in accordance with that similarity in principle to the free constitution of the United Kingdom which pervades the constitution of this Dominion, no Canadian legislature, Dominion or provincial, is subject in matters of taxation to that restriction which exists under the United States

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[17] Printed report published by Wm. Brown & Co., London, 1895, at pp. 120-1. *Cf.*, also *ibid.*, at p. 141. In a letter from the Board of Trade to the Colonial Office, dated July 13th, 1878, a copy of which is on file in the Governor-General's Office at Ottawa, the Board of Trade states that 'whilst measurement of tonnage is an Imperial matter, local taxation of shipping is essentially a colonial matter:' See Legislative Power in Canada, p. 642, n.

Constitution, and requires "all public taxation to be fair and equal in proportion to the value of property, so that no one class of individuals, and no one species of property, may be unequally or unduly assessed.'"[18] At the same time the Dominion Government has objected to provincial Acts discriminating in the matter of taxation against extra-provincial companies or individuals doing business in the province, although not resorting to disallowance. Thus by report of December 28th, 1901, upon a Prince Edward Island Act, the Minister of Justice says: "The undersigned does not consider that the public interest is served by allowing unequal taxation within a province as between the residents of that province, and the residents of other provinces of the Dominion who may happen to be doing business there." And by a report of March 4th, 1902, referring to another Prince Edward Island Act of the same kind, the Minister says: "No doubt both these Acts discriminate against companies, or individuals, established or residing outside of the province, and this is a policy which is not favoured by your Excellency's Government."[19]

Provincial power of taxation generally.—Now, as has been already seen, provincial legislatures have no powers of legislation (save as to their own immunities and privileges), excepting those enumerated in section 92 of the British North America Act.[20] Therefore, any power of taxation they have must be found there; and as Gwynne, J., says in *Reed* v. *Mousseau*,[21] the only sub-sections of section 92, which expressly authorize the raising by Act of the provincial legislatures of any revenue whatever, by any system of taxation, are Nos. 2, 9, and 15.[22] Although, however, we cannot, as Baby, J., does in *Bank of Toronto* v. *Lambe*,[23] claim for the province an inherent right to levy money by any mode or system of taxation within the province, and for provincial ends, it may well be that they have such power so far as they can bring it within No. 16 of section 92, as a matter ' of a merely local or private nature in the province.'[24] We are now, however, immediately concerned with No. 2 of section 92.

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[18] Kent's Commentaries, 12th ed., vol. 2, p. 331. See, also, Legislative Power in Canada, pp. 254-5, 720, n. 1; and *supra*, pp. 87-8. In *Dow* v. *Black* (1875), L. R. 6 P. C. at p. 282, the Privy Council decided that No. 2 of section 92 "must be taken to enable the provincial legislature wherever it shall see fit, to impose direct taxation for a local purpose upon a particular locality within the province."

[19] Provincial Legislation, 1901-1903, pp. 96-98; *Ibid.*, 1904-1906, p. 25. And see *Regina* v. *Wing Chong* (1885), B. C. (pt. 2) 150, referred to *supra*, p. 311, n., as to discrimination against aliens.

What is direct taxation?—This question has been brought before the Privy Council in four cases.[25] In the last of these four cases, the Brewers and Maltsters Association case, they held valid, as direct taxation, a provincial Act imposing, in order to raise a revenue for provincial purposes, a license fee on brewers and distillers, and other persons (though duly licensed, by the Government of Canada, for the manufacture and sale of fermented, spirituous, or other liquors) for licenses to sell within the province the liquors manufactured by them.[26] After referring there to their prior decision in *Bank of Toronto* v. *Lambe,* in which they held valid as direct taxation, a Quebec Act imposing, as a tax on every bank carrying on business within the province, a sum varying with the paid-up capital, with an additional sum for each office or place of business; and to John Stuart Mill's definition[27] of a direct tax as 'one which is demanded from the very persons who it is intended or desired should pay it,' as distinguished from indirect taxes, which are 'those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another,' which definition they had, in *Bank of Toronto* v. *Lambe,* taken as "seeming to them to embody with sufficient accuracy for this purpose" (*sc.* the purpose of legal definition) "the common understanding of the most obvious *indicia* of direct and indirect taxation, which were likely to have been present to the minds of those who passed the Federation Act," their lordships say:—"In the present case, as in *Lambe's* case, their lordships think the tax is demanded from the very person whom the legislature intended or desired should pay it. They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person. No such transfer of the burden would in the ordinary course take place, or can have been contemplated as the natural result of the legislation in the case of a tax like the present one, a uniform fee, trifling in amount, imposed alike upon all the brewers and distillers without any relation to the quantity of goods which they sell. It cannot have been intended by the imposition of such a burden to tax the customer or consumer. It is, of course, possible that in individual instances the person on whom the tax is imposed may be able to shift the burden to some other shoulders. But this may happen in the case of every direct tax." Here, then, the Judicial Committee indicate very clearly what is to be understood as 'direct taxation' within the meaning of the clause under consideration.

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[20] See *supra*, pp. 153-8.

[21] (1883) 8 S. C. R. at p. 431.

[22] Section 124 of the Federation Act provides that New Brunswick may continue to levy existing lumber dues, but may not increase the amount of such dues; and that the lumber of any of the provinces other than New Brunswick shall not be subject to such dues. In *Attorney-General of Quebec* v. *Reed* (1882), 26 L. C. J. at p. 355, Dorion, C.J., points out that this is an exception to the general rule that provincial legislatures have no power of indirect taxation.

[23] (1885) M. L. R. 1 Q. B. at p. 197. *Cf.* per Mathieu, J., in *Export Lumber Co.* v. *Lambe* (1885), 13 R. L. at p. 117.

[24] See *supra*, pp. 140-3; *infra*, pp. 627-9.

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[25] *Attorney-General for Quebec* v. *Queen Insurance Co.* (1878), 3 App. Cas. 1090; *Attorney-General of Quebec* v. *Reed* (1883), 10 App. Cas. 141; *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, and *Brewers and Maltsters Association of Ontario* v. *Attorney-General for Ontario*, [1897] A. C. 231. This last case was followed in *Rex* v. *Neiderstadt* (1905), 11 B. C. 347. In the United States Constitution it is provided (Art. 1, sec. 8) that 'no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.' Hence it would seem that no tax can be a direct tax in the sense of the United States Constitution, which is not capable of apportionment according to the rules thus laid down; and it has been seriously doubted if, in the sense of that Constitution, any taxes are direct taxes, except those on polls or on lands: Story on the Constitution of the United States, 5th ed., Vol. 1, pp. 703-4. Hence the American decisions as to what are direct taxes within the United States Constitution are inapplicable to the Constitution of Canada. This distinction has been pointed out and commented on in many Canadian cases: see Legislative Power in Canada, p. 720, n. 1.

[26] As to the power of provincial legislatures to impose license fees upon extra-provincial companies, Dominion or other, doing business in the province, see *supra*, pp. 373-377. As to the provincial legislatures having a general power to impose a license fee with a view to revenue, or to delegate such a power to a municipality, see *Re Foster and Township of Raleigh* (1910), 22 O. L. R. 26, 342.

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[27] As to this reference to Mill and the economists, see *Bank of Toronto* v. *Lambe*, 12 App. Cas. at pp. 581-3; and Legislative Power in Canada, p. 717, n. 2.

In *Attorney-General for Quebec* v. *The Queen Insurance Co.*,[28] they did not find it necessary to consider the scientific definition of direct or indirect taxation, because they held that, whether as used by political economists, or in jurisprudence in the Courts of law, or in the popular use, the term 'direct taxation' did not apply to the tax they had there to deal with, namely, a stamp imposed by statute on policies, renewals, and receipts, with provisions for avoiding the policy, renewal, or receipt, in a Court of law, if the stamp was not affixed.[29]

In *Attorney-General of Quebec* v. *Reed*,[30] the Board applied the same tests as in the first two decisions above mentioned, the tax in question being a stamp duty of ten cents imposed by a

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[28] (1878) 3 App. Cas. 1090.

[29] In *Attorney-General of Quebec* v. *Reed*, 3 Cart. at pp. 220-1, Ramsay, J., comments on this Privy Council decision, and denies that it "implies that a duty being subject to collection by means of a stamp, makes it necessarily indirect taxation." What the Privy Council decided, he says, was "only that the duty sought to be collected in that case, by a so-called license, was, in reality, an ordinary Stamp Act, and indirect taxation." So, also, per Pelletier, J., in *Choquette* v. *Lavergne* (1893), R. J. Q. 5 S. C. at pp. 122-3; per Lacoste, C.J., S. C. in App., R. J. Q. 3 Q. B. at pp. 308-9.

[30] (1883) 10 App. Cas. 141; followed *Plummer Wagon Co.* v. *Wilson*, 3 M. R. 68.

Quebec Act on every exhibit produced in Court in any action depending therein. They said that the view most favourable to the tax being a direct tax was that of Mill above mentioned; but that, even on this view of the matter, the tax was not direct,[31] for from the very nature of legal proceedings, "until they terminate, as a rule and speaking generally, the ultimate incidence of such a payment cannot be ascertained . . The legislature, in imposing the tax, cannot have in contemplation, one way or the other, the ultimate determination of the suit, or the final incidence of the burden, whether upon the person who had to pay it at the moment when it was exigible, or upon anyone else . . . In truth, that is a matter of absolute indifference to the intention of the legislature. On the other hand . . . it may be assumed that the person who pays it is in the expectation and intention that he may be indemnified, and the law which enacts it, cannot assume that that expectation and intention may not be realized. As in all other cases of indirect taxation, in particular instances, by particular bargains and arrangements of individuals, that which is the generally presumed incidence may be altered. An importer may be himself a consumer. Where a stamp duty upon transactions of purchase and sale is payable, there may be special arrangements between parties determining who shall bear it.[32] The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment, and if, at the time, the ultimate incidence is uncertain, then, as it appears to their lordships, it cannot, in this view, be called direct taxation within the meaning of the second section of the 92nd clause of the Federation Act."

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[31] 54-55 Vict. c. 28, D., passed July 10th, 1891, provided, by section 5, that all fees payable on proceedings in the provincial Courts, purporting to be imposed by or under the authority of any Act of the provincial legislature, shall be payable according to the provisions of such Acts respectively. This Act, however, appears as one of those repealed from the coming into force of R. S. C. 1906, in Sched. A. of that consolidation.

One or two decisions remain to be noticed. In *In re Yorkshire Guarantee and Securities Corporation, Limited,*[33] the Supreme Court of British Columbia held, unanimously, that a tax imposed by the provincial Assessment Act upon mortgages was a direct tax, and *intra vires,* within the *indicia* laid down by the Privy Council in the above cases, notwithstanding that the evidence showed that the company required their mortgagors to recoup the amount. At p. 274, Drake, J., says: "The intention of the legislature is that the owner of the personalty is to bear the tax; it is imposed on him, and he is the person intended to bear it. It is not imposed on him with a view that someone else (the mortgagor) shall bear it, or that it shall be distributed over a class of persons. The tax is not imposed on the dollars, but on the owners of the dollars. Customs duties are imposed on the goods, not on the owner of the goods. I cannot see how the appellants in this case can escape from the decision of *Bank of Toronto* v. *Lambe.* This tax appears to me to fall within the *indicia* laid down by the Privy Council in that case for discriminating between a direct and indirect tax."

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[32] It might seem that the Privy Council here intimate the view that a stamp duty upon transactions of purchase and sale would be an indirect tax, by reason of the uncertainty of the ultimate incidence of it; but *held* otherwise in the case of a stamp duty on sales of land, in *Choquette* v. *Lavergne* (1893-4), R. J. Q. 5 S. C. 108, in App. *sub nom. Lamonde* v. *Lavergne*, R. J. Q. 3 Q. B. 303. See per Lacoste, C.J., R. J. Q. 3 Q. B. at p. 308; per Pelletier, J., R. J. Q. 5 S. C. at pp. 121-3. However, when in 1911, the Ontario legislature enacted that there should be levied a tax of two cents payable by the transferor in money or stamps for every $100, or fraction thereof, of the par value upon every change of ownership of shares of debenture stock issued by any corporation, or company, made or carried into effect in the province, Mr. Doherty, Minister of Justice, by his report of January 30th, 1912, questions whether such taxation is not indirect.

[33] (1895) 4 B. C. 258.

In *Le College de Médecins* v. *Bringham,*[34] it was held that a provincial Act requiring all members of the College of Physicians and Surgeons of the province to pay two dollars for the use of the college was *intra vires.*[34a]

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[34] (1888) 16 R. L. 283. By report of December 24th, 1894, the Minister of Justice says:—"The question may arise whether taxation which renders both the owner, occupier, and tenant of land liable for a tax, the amount of which is arrived at having regard to the extent. and value of the land so owned, occupied, or held under lease, is not indirect, and, therefore, *ultra vires* of a provincial legislature:" Hodgins' Provincial Legislation, 1867-1895, p. 1229. By report of December 27th, 1901, the Minister of Justice objected to a British Columbia Act 'to provide for the collection of a tax on persons,' which required every male person in the province to pay an annual revenue tax of $3, and that every merchant, farmer, trader, or employer of labour should pay the said annual tax for every male person in his employ, and might deduct the same from salary or wages due to such male person, and should be liable for the same, that this was clearly indirect taxation under the judgment in *Bank of Toronto* v. *Lambe, supra*, and that the Act should be repealed, but it appeared that similar provisions had been allowed to go into force before, and for this, and other reasons, the Act was not disallowed.

[34a] Mr. Clement (*op. cit.* p. 259) tabulates different kinds of taxation which have been held to be within the competence of a provincial legislature in the cases. And see *infra*, pp. 414-423.

'In order to the raising of a revenue for provincial purposes.'—A question arises whether these words in No. 2 of section 92 of the Federation Act indicate that direct taxation may not be resorted to by a provincial legislature in order to raise a revenue for local or municipal purposes, as distinguished from general provincial purposes. This has been supposed to be the intent of the clause by some judges,[35] and colour is lent to such a view by the fact that No. 9 of section 92 expressly authorizes legislation in relation to the licenses there referred to 'in order to the raising of a revenue for provincial, local, or municipal purposes.' However in *Dow* v. *Black,*[36] already referred to, where the constitutionality of a provincial Act authorizing the inhabitants of a parish to raise by direct taxation, within the parish, a subsidy for a certain railway came into question, and it was contended that No. 2 of section 92 only authorizes direct taxation incident on the whole province for the general purposes of the whole province, the Privy Council say: "Their lordships see no ground for giving so limited a construction to this clause of the statute. They think it must be taken to enable the provincial legislature, whenever it shall see fit, to impose direct taxation for a local purpose upon a particular locality within the province."[37]

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[35] See Legislative Power in Canada, p. 722, n. 1, where the words of Lord Watson, addressed to Counsel on the argument in *The Brewers and Maltsters Association of Ontario* case, [1897] A. C. 231, in reference to these words are cited:—"You construe it very reasonably as meaning revenue purposes arising within the province somewhere."

[36] (1875) L. R. 6 P. C. 272.

In the *Brewers and Maltsters Association* case,[38] the Judicial Committee, while passing, as we have seen,[39] upon the validity of the specific enactment before them, refused to answer the more academic question submitted as to whether the provincial legislature could impose direct taxation, not only in order to raise a revenue for provincial purposes, but also "for any other object within provincial jurisdiction;" but in the course of the argument in that case,[40] Lord Herschell is reported as saying as to No. 9 of section 92: "They may have put in sub-section 9 in order to make certain that a particular kind of things would beyond all question be within taxation powers.''[41]

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[37] As Mr. Clement says in his Law of the Canadian Constitution, 2nd ed., p. 252, this decision 'is sufficient warrant for the whole system of municipal taxation now operative throughout Canada.'

[38] [1897] A. C. 231.

[39] *Supra*, p. 374.

[40] Manuscript transcript of notes of Marten, Meredith and Henderson, at p. 55. In a report of January 8th, 1904, the Minister of Justice says he has "very serious doubts as to the capacity of a local legislature to enact such provisions as in the Ontario Consolidated Municipal Act, 1903, whereby municipal councils are authorized to make by-laws, *inter alia*, for taking land within the municipality for purposes of a militia drill shed or armoury, and for regulating harbours, erecting wharves, piers, and docks in harbours, etc., and for aiding any regularly organized rifle association, and supplementing the sum paid during the annual drill of the militia, on the ground that militia and defence, and navigation and shipping, are exclusively subjects for the Dominion parliament, and that a provincial legislature has no power of taxation except for provincial, municipal, or local purposes; he does not, however, consider the provisions in question so objectionable in substance as to require the disallowance of the Act: Provincial Legislation, 1901-2, pp. 20-21.

"**Within the province.**"—It is next to be noticed that the direct taxation authorized by No. 2 of section 92 has to be 'within the province,' and in *Woodruff* v. *Attorney-General for Ontario*,[42] the Privy Council have said that it is *ultra vires* of a provincial legislature to tax property not within the province. They held, therefore, that the Ontario Succession Duty Act which laid a succession duty upon property, enacting (sec. 4) 'the following property shall be subject to a succession duty as hereinafter provided,' etc., did not include within its scope moveable property, being in the case before them, bonds and municipal debentures, and a cash balance in a New York bank, locally situate outside the province of Ontario, which it was alleged that the testator, a domiciled inhabitant of the province, had transferred in his lifetime, with intent that the transfers should only take effect after his death. Their lordships say (p. 513): "The pith of the matter seems to be that the powers of the legislature being strictly limited to 'direct taxation within the province,' any attempt to levy a tax on property locally situate outside the province is beyond their competence. . . Directly or indirectly the contention of the Attorney-General involves the very thing which the legislature has forbidden to the province—taxation of property not within the province." Holding, then, that the provincial legislature can only tax property locally situate in the province, the Board naturally make no express reference to the maxim *mobilia sequuntur personam,* or *mobilia ossibus inhærent,* referred to in the judgments below.

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[41] The phrase 'for provincial purposes' may be compared with the phrase 'for provincial objects' in No. 11 of section 92. *q.v., infra*, pp. 464-479.

[42] [1908] A. C. 508. Reported below, 15 O. L. R. 416. But though the property must be within the province, the person to be taxed need not be domiciled, or even resident within it, as the Privy Council pointed out in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. at pp. 584-5, saying:—" The next question is whether the tax is taxation within the province. It is urged that the bank is a Toronto corporation, having its domicil there, and having its capital placed there; that the tax is on the capital of the bank; that it must, therefore, fall on a person or persons, or on property, not within Quebec. The answer to this is that No. 2 of section 92 of the British North America Act, does not require that the persons to be taxed by Quebec are to be domiciled or even resident in Quebec. Any persons found within the province may be legally taxed there if taxed directly. This bank," (*s.c.* the Bank of Toronto) " is found to be carrying on business there, and on that ground alone it is taxed. There is no attempt to tax the capital of the Bank, any more than its profits. The bank itself is directly ordered to pay a sum of money." *Nickle* v. *Douglas* (1875), 35 U. C. R. 126, 37 U. C. R. 51, decided that a person domiciled in Kingston, Ontario, should not be assessed upon stock owned by him in the Merchants Bank, which had its head office in Montreal, inasmuch as such stock was not property in the province within the meaning of the Ontario Assessment Act. In *Lovitt* v. *The King* (1910), 43 S. C. R. at pp. 160-1, Anglin, J., says:—"The legislature of a British province, which is empowered to impose only 'taxation within the province,' cannot by legislative declaration make anything property within the province which would not otherwise be such according to the recognised principles of English law. If it could, the constitutional limitation upon its power would be a dead letter." In connection with *Woodruff* v. *Attorney-General for Ontario*, see *Treasurer of Province of Ontario* v. *Patten* (1910), 22 O. L. R. 184.

In the subsequent case of *Rex* v. *Lovitt,*[43] however, they had occasion to do so. They there held that, where a testator resident and domiciled in Nova Scotia, was at the date of his death possessed of a sum of money deposited in a New Brunswick branch of the Bank of British North America, the head office of which is in London, which was paid to his executors after they had obtained ancillary probate in New Brunswick, the executors were liable to pay succession duty under the New Brunswick Succession Duty Act, 1896, by which all property situate within the province is made liable to succession duty whether the deceased was domiciled in that province or not. They held, in the first place, upon the decisions respecting branch banks, that the debt of the bank to the deceased was property situate within New Brunswick.[44] The defendants, however, contended that the situation of the obligation of the bank, the property in question, was to be determined, not by its actual locality, but according to the principle expressed in the maxim *mobilia sequuntur personam,* so that, in this view, the property was neither in London nor in New Brunswick, but in Nova Scotia. Their lordships, therefore, explain this maxim as one arising from a general English rule of construction of statutes relating to legacy and succession duties, namely, that the duties are intended to be imposed only on those who become entitled by virtue of English law; from which it follows that moveable property situate in England of one who dies domiciled abroad is exempt, inasmuch as in respect to the distribution of such property,

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[43] [1912] A. C. 212. Reported below, 43 S. C. R. 106, 37 N. B. 558. And see further, as to these maxims, *infra*, pp. 404-7.

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[44] See at p. 219.

English Courts act, not on English law, but on the law of the domicile. Those who succeed to such property succeed to it, not by virtue of English law, but by virtue of the law of the domicile. They continue: " The principle or practice thus defined is considered just and expedient as between nations, and our Courts give it full effect in the construction of taxing statutes, both English and Colonial, but its application may be excluded by the use of apt and clear words in a statute for the purpose . . Here the legislature of New Brunswick has expressly enacted that all property situate in the province shall be subject to a succession duty though the testator may have had his fixed place of abode or domicile outside the province. The Act purports to exclude the application of the maxim *mobilia sequuntur personam* as regards personal estate within the province belonging to persons domiciled elsewhere, but to retain it as regards the property of New Brunswick citizens situate outside the province."[45]

Here, then, we have two decisions of the Privy Council, one that a provincial legislature cannot place a tax directly on property locally situate outside the province—and the other that a provincial legislature can place a tax upon property locally situate inside the province to which a person succeeds under a will or an intestacy, notwithstanding that the deceased owner was domiciled outside the province at the time of his death, provided it excludes by the use of apt and clear words the application of the maxim *mobilia sequuntur personam.*

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[45] The Act purported to bring within the scope of the succession duty:—

(*a*) All property situate within the province whether the deceased was domiciled there or not;

(*b*) All property outside the province belonging to persons domiciled therein; and

(*c*) All property outside the province belonging to persons not domiciled therein, if such property were devised to a person resident therein.

The question remains: Can a provincial legislature indirectly place a succession duty tax on property locally situate outside the province, by placing the tax, not directly on the property, but on the transmission of the property, by succession, to a person in the province? In *King* v. *Cotton,*[46] the majority of the Supreme Court have held that it can. The Court there was called on to apply the Quebec Succession Duty Act to moveables, having a local *situs* outside the province, which formed part of the succession of a decedent domiciled within the province. The legislation in question imposed a tax *on the transmission* owing to death of ' moveable and immoveable property ' in the province, calculated upon the value of the property transmitted; and specially provided that the word ' property ' should include ' all moveables, *wherever situate,* of persons having their domicile (or residing) in the province of Quebec at the time of their death.' The Court (Davies and Anglin, JJ., dissenting), held, that the moveable property in question, being bonds, stocks, promissory notes, jewellery and pictures, actually situate in the United States at the date of the demise of the decedent, and forming part of his estate, was subject to the duty imposed by the Act, distinguishing *Woodruff* v. *Attorney-General for Ontario.*[47] Thus Fitzpatrick, C.J., says (p. 477): "There is no question here of an attempt to tax property situate beyond the jurisdiction; the Quebec statute merely fixes the conditions subject to which it gives a good title to the property of the deceased. In a word, the tax is imposed as a condition of the devolution." At p. 475, he says: "By the law of the domicile of the deceased, the title under which the heirs receive the estate, the moveable property of the deceased, wherever situate, is governed. In such a case the maxim of *mobilia ossibus inhærent* finds its application." Although, however, that maxim may be thus cited to justify, as it were, the legislation, it can have no bearing on the question of its constitutional validity; nor does his lordship say it has. Idington, J., distinguishes the Woodruff case in the same way.[48] At pp. 492-6 he says: "I cannot think any doubt can exist as to the right to tax the transmission. . . . I cannot assent to the . . . assumption that 'direct taxation within the province' necessarily means only taxation in respect of property physically within the province. . . . A man may be domiciled within a province, and can be made answerable for taxes imposed upon him in respect of property outside the province, but over which the laws of the province may have given him the only foundation he can have for dominion or legal possession. For example, a man domiciled within a province may build railway cars, and lease them to one of the railway companies running into the United States, and sometimes have them at home and sometimes abroad. Can he not be taxable in respect of such property? . . Then we have the income tax which forms no mean part of the aggregate municipal taxation. Yet it often rests on no other foundation in law than the domicile of the man taxed. The income tax has never been questioned. Yet the sources from which the income flows may be in every quarter of the globe. . . Surely the fact that the income may never have reached home, and may be left abroad to earn more, is not to determine the power of imposing such a tax": and he cites *Bank of Toronto* v. *Lambe,*[49] on the point of taxation of income not being indirect.

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[46] (1912) 45 S. C. R. 469. Reported below, R. J. Q. 20 K.B. 162.

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[47] [1908] A. C. 508.

[48] Pages 487-8, 492-6. As Idington, J., points out, in the Woodruff case, the property in question had actually been transferred to another person in the lifetime of the deceased; but that does not seem to affect the *ratio decidendi* of that decision..

At pp. 498-9, he says: "'Direct taxation within a province,' and 'direct taxation of property within a province' are, I submit, not interchangeable terms. It is the former term that is used, and if the meaning of the latter term was what it purposed, surely it would have been so expressed. And when we find the Privy Council has not adhered to the literal expression of the same power by limiting it to the 'revenue for provincial purposes,' but has, heretofore, found in that, despite the words used, power to delegate it to corporate municipal and school boards,[50] I do not think we should seek, in another spirit of interpretation, relative to words in the same sentence, to restrict the power by something not expressed, and to something quite unusual."

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[49] (1887) 12 App. Cas. 575. *Sed quære:* Is there not a well recognized distinction between a tax on property, and a tax on income?

Duff, J., at p. 507, says: "The point for consideration, then, is this: Was the authority (which the provinces unquestionably possessed before Confederation) to impose duties upon, or in respect of, the benefits acquired under a succession comprising in fact extra-territorial moveables, abrogated by the provision of the British North America Act, which limits the provincial power of taxation to 'taxation within the province?' . . . On what ground are we so to restrict the words 'taxation within the province' as to exclude such successions from the taxing authority of the province? There appears to be no ground for doing so. The possibility of those words being so restricted does not appear to have occurred to the Judicial Committee when considering the case of *Lovitt* v. *The King.*"[51]

In his dissenting judgment, however, in this case, Davies, J., held that the effect of the general language in *Woodruff* v. *Attorney-General for Ontario,*[52] cannot be so cut down; and that that judgment was not based upon the mode in which the Ontario legislature attempted to levy succession duties there in dispute, but upon the denial of the existence of any constitutional power in the legislature, either directly or indirectly, to impose such duties upon property not within the province. Anglin, J., took a similar view. He says (p. 539): " The view which I take of the British North America Act provision is that it should be read as authorizing direct taxation only where the real subject of the tax—whether person, business, or property—is within the province . . . Under the Quebec Act imposing death duties, for the reasons I have stated, I am of the opinion that the real subject of taxation is the property passing, notwithstanding the clearly expressed intention of the legislature to fasten the tax upon the transmission;" and (at pp. 540-541) he points out, with much force, if one may presume to say so, that in the Woodruff case, the Attorney-General for Ontario argued, as reported, that " the duty claimed was not a tax on property, but a tax on the devolution or succession: the duty was imposed on persons beneficially entitled . . .; the persons taxed were resident in the province;" but that the Judicial Committee replied to this: —" Directly or indirectly, the contention of the Attorney-General involves the very thing which the legislature has forbidden to the province—taxation of property not within the province;"

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[50] See *supra*, pp. 69-73; 400.

[51] [1912] A. C. 212. The learned judge seems to mean that, as in the Lovitt case the Court held that property in the province could be taxed, on succession, although the decedent was domiciled out of the province; why, then, cannot the succession to property out of the province be taxed where the decedent was domiciled in the province? If one is taxation 'within the province,' why is not, also, the latter? In *Re Renfrew* (1898), 29 O. R. at p. 569, Street, J., says: "There is no doubt that it was within the powers of our legislature to have enacted that the property of a deceased person situate outside the province should be considered in arriving at the aggregate value of the property of the deceased."

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[52] [1908] A. C. 508.

and he quotes their further words: "The pith of the matter seems to be that, the power of the provincial legislature being strictly limited to 'direct taxation within the province,' any attempt to levy a tax on property locally situate outside the province is beyond their competence."[53]

Provincial indirect taxation.—This seems the most convenient place to consider the general subject of provincial taxation, apart from No. 2 or No. 9 of section 92, which, unless we consider No. 15 should be included, are the only clauses in the Federation Act, excepting section 124 concerning New Brunswick lumber dues,[54] which give express powers of taxation to provincial legislatures, and all relate to direct taxation.[55] If, then, the provinces have any powers at all of indirect taxation, it can only be such indirect taxation as is of 'a merely local or private nature in the province,' within the meaning of No. 16 of section 92, or such indirect taxation as is incidental to the exercise of the other express powers conferred by section 92. And, moreover, any such provincial power of indirect taxation is obviously greatly restricted by section 121, which provides that 'all articles of the growth, produce, or manufacture, of any one of the provinces shall, from and after the Union, be admitted free into each of the other provinces;' and by section 122, which places customs and excise laws under the Dominion jurisdiction. Thus these two sections place beyond provincial control the main field of indirect taxation, and, speaking generally, it may therefore be, without doubt, correctly said that the provinces are confined to direct taxation.[56]

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[53] And see *supra*, pp. 402-3. As to its making no difference, if the property in respect to which the impost be exacted, is in the hands of executors within the province,—that the duties are declared by the Act imposing them to be payable at the date of the death, when, *ex hypothesi*, the property had not a *situs* within the province, except constructively: see per Duff, J., in *Lovitt* v. *The King* (1910), 43 S. C. R. at pp. 143-4. He there says:—"The declaration that the duties should be payable at death, or within one year thereafter, appears to have been intended to afford a basis for levying interest from the date of death in default of payment when due. Such incidents of the tax appear to me, once it is clear that the legislature is aiming alone at property within the province, to be unobjectionable; and, in any view, I can see no difficulty in giving to every part of the provision its full application as regards assets which by legal construction are considered New Brunswick assets in the hands of the executors at the date of the testator's death."

[54] See *supra*, p. 393, n.

[55] As to No. 9 of section 92, see *infra*, pp. 433-445.

But it does not seem to follow that the provincial legislatures may not have a limited power to impose indirect taxation either under No. 16 of section 92, in which case it would have to be imposed under such circumstances and conditions as to make its imposition a merely local matter in the province—but, as has been seen,[57] a subject-matter of legislation may be this, and yet may extend in its operation over the whole province—or as incidental to one of their other express powers. Some of these seem to clearly suggest power of taxation, as No. 4 'the payment of officers,'—No. 6, 'the maintenance' of public and reformatory prisons in and for the province,—No. 7 'the maintenance' of hospitals, etc.,—No. 14 'the maintenance' of provincial courts; and there is not a word in them to limit such taxation to direct taxation.

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[56] It would seem in this general sense that the Privy Council were speaking in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. at p. 586. *Cf. St. Catharines Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. at p. 57; *Dow* v. *Black* (1875), L. R. 6 P. C. at p. 282; *Lamonde* v. *Lavergne* (1894), R. J. Q. 3 Q. B. at p. 314; Legislative Power in Canada, p. 731, n. 2.

[57] See *supra*, pp. 140-3.

In *Bank of Toronto* v. *Lambe*,[58] in the Quebec Court of Queen's Bench, Ramsay, J., claims the Privy Council judgment in *Dow* v. *Black*,[59] as direct authority that Nos. 2 and 9 do not exclude from the power of provincial legislatures the right to impose other forms of taxation, as, for example, under No. 16 of section 92; and points out the curious clerical error in the report of their lordships' judgment where '9th article of section 92,' is printed, instead of '16th article of section 92.' So, too, several of the Supreme Court judges in *Attorney-General* v. *Reed*,[60] express views on the whole favourable to a provincial power of imposing indirect taxes under No. 16 of section 92, or as incidental to some of the other of their express powers under that section.[61] The decision of the Quebec Court of Queen's Bench in *Bank of Toronto* v. *Lambe*,[62] may perhaps be claimed as a direct decision on the point as regards No. 16 of section 92, for, after deciding that the taxes there in question were direct taxes, the Court, as would appear from the report, went beyond what was necessary to add a clause in the formal judgment that, even assuming they were not direct taxes, the legislature had power to impose the same, inasmuch as the said taxes were 'matters of a merely local or private nature in the province.' The Privy Council, also, seem to countenance the claim to power to impose indirect taxation incidentally to the exercise of power No. 14 of section 92—'the administration of justice in the province, including the constitution, maintenance, and organization of provincial courts'—in *Attorney-General of Quebec* v. *Reed.*[63] It is, it is submitted, more consistent with the plenary nature of the powers of provincial legislatures under the British North America Act, that they should be held to have such right to impose indirect taxation as has been suggested in the context, than that it should be denied them.[64]

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[58] (1885) M. L. R. 1 Q. B. at p. 192. See, also, per Baby, J., S. C. at pp. 197-9.

[59] (1875) L. R. 6 P. C. 272, at p. 282. *Cf.* per Dorion, C.J., in *Bank of Toronto* v. *Lambe*, M. L. R. 1 Q. B. at p. 145. The provincial Act in question in *Dow* v. *Black*, was one empowering the majority of the inhabitants of the Parish of St. Stephen, in New Brunswick, to raise by local taxation, a subsidy designed to promote the construction of a certain railway extending beyond the limits of the province into the State of Maine, but already authorized by statute prior to Confederation.

[60] *Sub nom. Reed* v. *Mousseau* (1883), 8 S. C. R. 408.

[61] See Legislative Power in Canada, p. 740, n. 1.

[62] (1885) M. L. R. 1 Q. B. 122.

What the provinces can tax.—Dominion lands.—The restriction of provincial taxation to property in the province has already been discussed in light of the authorities as they at present exist;[65] but there are certain persons and property for which, though within the province, exemption from provincial taxation has been claimed, on account of their Dominion character. Of these it is now proposed to speak. By section 125 of the British North America Act it is expressly provided that 'no lands or property belonging to Canada, or any province, shall be liable to taxation;' and in *Ruddell* v. *Georgeson,*[66] it was held that unpatented lands are not liable to be assessed or sold for taxes under provincial Acts. Killam, J., however (p. 2), held that the provincial legislature has the power to tax any interest in Dominion lands, legal or equitable, which the Crown has really conferred on a subject, but not where no estate or interest has been so conferred; and he refers to *Canadian Pacific R. W. Co.* v. *Rural Municipality of Cornwallis.*[67] And now in *Calgary and Edmonton Land Co.* v. *Attorney-General of Alberta,*[68] the matter has again come before the Courts. The Calgary and Edmonton R. W. Co., under Dominion Act, and by virtue of a contract entered into pursuant to Orders in Council issued under that Act, was entitled to receive certain lands from the Dominion of Canada in aid of the construction of a railway; and designated certain lands to be allotted to it pursuant to Order-in-council and contract; and in 1892 assigned by deed 'all its estate, right, title, interest, claim, and demand,' in certain of the said lands to the Calgary and Edmonton Land Company. In 1906, before patents had been actually granted, the land was taxed under an Alberta Act of 1906, and certain prior local Ordinances. It was held by the Supreme Court, affirming the decision of the Court below, that the Land Company having become entitled to the whole equitable interest in the land, the Crown in the right of the Dominion retaining only the bare legal estate, the land was not land ' belonging to ' the Crown in the right of the Dominion, within the meaning of section 125 of the Federation Act, and was, therefore, not exempt from taxation under that section; and that the provincial legislature might provide for the levy and collection of taxes so imposed, by the transfer of the interests affected by such taxes. " The exemptions provided for by that section," says Davies, J. (p. 180), " are for the protection of the interest of the Crown only, not of those who have derived beneficial interests in lands from the Crown." Idington, J., says (p. 186): " The assignees of the concessionaries were, in 1906, just as taxable, as are purchasers from the Crown paying their purchase money by instalments, as, I presume, a great part of the country in question stands today." Anglin, J. (pp. 189-191), after referring, at length, to *Regina* v. *County of Wellington*,[69] says:—" I think that full effect is given to section 125 of the British North America Act, 1867, by holding that it precludes the taxation of whatever interest the Crown holds in any land or property, and that so long as such interest subsists, the taxation of any other interest in the land, and any sale or other disposition made of it to satisfy unpaid taxes, while valid, is always subject to the rights of the Crown which remain unaffected thereby.[70]

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[63] (1884) 10 App. Cas. 141, at pp. 144-5. See, however, *Dulmage* v. *Douglas* (1887), 4 Man. 495. *Cf. Crawford* v. *Duffield* (1888), 5 Man. 121.

[64] See, upon the whole subject, Legislative Power in Canada, pp. 730-741.

[65] *Supra*, pp. 402-411.

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[66] (1893) 9 Man. 407.

[67] 7 Man. at p. 24 *q.v.* And see S. C. in App. 19 S. C. R. at p. 710.

[68] (1911) 45 S. C. R. 170; reported below, 2 Alta. 446.

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[69] 17 O. R. 615, 17 O. A. R. 421, 19 S. C. R. 510.

What the provinces can tax (continued).—Dominion officials.—It has now been held in *Abbott* v. *City of St. John,*[71] thus overruling a number of previous Canadian decisions,[72] that, notwithstanding No. 8 of section 91, which provides that Parliament shall have exclusive legislative authority over the fixing of, and providing for, the salaries and allowances of civil and other officers of the Government of Canada, a civil or other officer of the Government of Canada may be lawfully taxed in respect to his income, as such, by the municipality in which he resides under the authority of provincial legislation. Duff, J., says (p. 619): " Although *Leprohon* v.

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[70] See, further, per Gwynne, J., in *Whelan* v. *Ryan* (1891), 20 S. C. R. at p. 73; *Rural Municipality of Norfolk* v. *Warren* (1892), 8 Man. 481; *Alloway* v. *Rural Municipality of Morris* (1908), 18 Man. 361.

[71] (1908), 40 S. C. R. 597. Reported below, 38 N. B. 421.

[72] *E.g. Leprohon* v. *City of Ottawa* (1877-8), 40 U. C. R. 478, 2 O. A. R. 522; *Ex parte Killam* (1898), 34 N. B. 530; *Desjardins* v. *La Corporation de la Cité de Quebec* (1900), R. J. Q. 18 S. C. 434; *Ex parte Timothy Burke* (1896), 34 N. B. 200, and other cases referred to in Legislative Power of Canada, pp. 671-8, where the view of the law now upheld by the Supreme Court in *Abbott* v. *City of St. John* was anticipated. So, also, *Coté* v. *Watson* (1877), 3 Q. L. R. 157, is now evidently unsustainable, where it was held that the Quebec License Act, 1870, in so far as it sought to impose a tax on the sum realized from the sale of an insolvent's effects when made under the Dominion Insolvent Act, 1869, (the said tax being in the form of a penalty recoverable against the assignee in insolvency for selling by auction the goods of the insolvent without taking out a license as prescribed by its provisions), was *ultra vires.*

City of Ottawa has not been expressly overruled, the grounds of it have been so thoroughly undermined by subsequent decisions of the Judicial Committee, that it can . . no longer afford a guide to the interpretation of the British North America Act.'' Davies, J., says (p. 606): "It must be borne in mind that the law does not provide for a special tax on Dominion officials, but for a general undiscriminating tax upon the incomes of residents, and that Dominion officials could only be taxed upon their incomes in the same ratio and proportion as other residents. At any rate, if, under the guise of exercising power of taxation, confiscation of a substantial part of official and other salaries were attempted, it would be then time enough to consider the question, and there need not be assumed beforehand such a suggested misuse of the power.'' Maclennan, J., says (p. 616): "No attempt is made to seize or appropriate the income itself,"[73] or to anticipate its payment. He (the inhabitant who is taxed), receives it, and applies it as he thinks fit, in discharge of his obligations.''[74]

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[73] When in 1904, the Quebec Legislature passed a Bill which the Lieutenant-Governor thought might be construed as rendering liable to seizure the salaries of public officers appointed by the Federal Government, he reserved it for the signification of the pleasure of the Governor-General, and by report of October 29th, 1904, the Minister of Justice expressed his opinion that, for the above reasons, the Bill should not receive effect at the hands of the Dominion Government, which was approved by Order-in-Council: Provincial Legislation, 1904-1906, p. 12. On this distinction the judgment in *Evans* v. *Hudon* (1877), 22 L. C. J. 268, that a provincial legislature has no power to declare liable to seizure the salaries of employees of the Federal Government, may perhaps still stand.

[74] Attention is called in this case to the cardinal distinction between the Australian Constitution and our own, that, in the

In the Supreme Court, as well as in the Court below, in *Abbott* v. *City of St. John,* the decision of the Privy Council on an appeal in *Webb* v. *Outrim,*[75] was relied on, the Privy Council having then held that an officer of the Australian Commonwealth resident in Victoria, and receiving his official salary in that State, is liable to be assessed in respect thereof, for income taxes imposed by an Act of the Victorian legislature. Their lordships held that there being no express provision in the Commonwealth Act restricting the power of the Victorian legislature to impose a tax on the salary of an officer of the Commonwealth, no such restriction could be implied merely because the imposition of the tax might interfere with the free exercise of the legislative or executive power of the Commonwealth. They deny the application of *McCulloch* v. *State of Maryland,*[76] on which the judges relied in *Leprohon* v. *City of Ottawa.*[77] They point out (p. 88) that: "No State of the Australian Commonwealth has the power of independent legislation possessed by the States of the American Union. Every Act of the Victorian Council and As-

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case of Australia, general powers were carved out of the powers which the provinces had previous to federation, and given to the Federal parliament, the residuum of power remaining in the provinces; whereas in Canada specific powers of legislation were given to the provinces, and the residuum of power was given to the Dominion. See *supra*, pp. 89-94.

[75] [1907] A. C. 81. Reference may be made in connection with this case to the review of the Australian cases upholding the immunity of Commonwealth Agencies in an Article on the Legal Interpretation of the Constitution of the Commonwealth, by A. B. Keith, in Jl. of Comp. Legisl. N.S., Vol. XII., pp. 95-103.

[76] 4 Wheat. 316.

[77] 40 U. C. R. 478, 2 O. A. R. 522.

sembly requires the assent of the Crown, but when it is assented to, it becomes an Act of the Parliament, as much as any Imperial Act, though the elements by which it is authorized are different. If, indeed, it were repugnant to the provisions of any Act of Parliament extending to the Colony, it might be inoperative to the extent of its repugnancy (see Colonial Laws Validity Act, 1865),[78] but with this exception, no authority exists by which its validity can be questioned or impeached. The American Union, on the other hand, has erected a tribunal which possesses jurisdiction to annul a statute on the ground that it is unconstitutional. But in the British Constitution, though sometimes the phrase ' unconstitutional ' is used to describe a statute which, though within the legal power of the legislature to enact, is contrary to the tone and spirit of our institutions, and to condemn the statesmanship which has advised the enactment of such a law, still, notwithstanding such condemnation, the statute in question is the law, and must be obeyed. . . The enactments to which attention has been directed do not seem to leave any room for implied prohibition. *Expressum facit cessare tacitum.*"[79]

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[78] *Supra*, pp. 53-4.

[79] This is all applicable to our Constitution under the British North America Act. See the passage from the judgment of the Privy Council in *Bank of Toronto* v. *Lambe*, cited *supra*, pp. 30-31. It is, perhaps, strictly speaking, more correct to say that the Courts with us have jurisdiction to declare Dominion or provincial statutes *ultra vires* (just as they may declare a municipal by-law *ultra vires*), than to say that they have jurisdiction to declare such statutes "unconstitutional." The British North America Act has nothing in it corresponding to the broad words in the United States Constitution respecting the jurisdiction of

In *Fillmore* v. *Colburn*[80] the Supreme Court of Nova Scotia held that a provincial Act requiring all the ratepayers of a section to perform statute labour on the highway, or commute, was *intra vires* as applied against a section-man employed on the Intercolonial Railway by the Government of Canada.[81]

What the Provinces can tax (continued).—Dominion corporations.[82]—That the provinces can tax banks, which are necessarily Dominion corporations, (No. 15 of section 91), is established by the Privy Council decision in *Bank of Toronto* v. *Lambe*,[83] who there upheld a Quebec Act imposing certain direct taxes on all banks doing business in that province; and, in that con-

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the Supreme Court, whose judicial power it provides (Act III. sec. 2), 'shall extend to all cases in law and equity arising under this constitution.' See Story on the Constitution, 5th ed., secs. 1582-3. *Cf.* an Address by Mr. Justice Riddell on the Constitutions of the United States and Canada (1912), 32 C. L. J. 849; also the Australian case, *Baxter* v. *Commissioners of Taxation* (1907), 4 C. L. R. 1087.

[80] 28 N. S. 292.

[81] As to taxing soldiers and sailors, *cf.* per Robinson, C.J., in *Tully* v. *The Principal Officers of Her Majesty's Ordnance* (1847), 5 U. C. R. at p. 14. In *Re Toronto Harbour Commissioners* (1881), 28 Gr. at p. 195, Spragge, C., points out that there is certainly nothing to prevent provincial authorities granting compensation to the Commissioners of Toronto harbour even though that harbour may be, under the British North America Act, the property of the Dominion of Canada, when, as the fact was, the Crown as represented by the Dominion Government had not itself fixed any compensation for the Commissioners' services.

[82] As to provincial power to require Dominion and other extra-provincial companies to take out a license before doing business in the province, see *supra*, pp. 373-7. As to what constitutes carrying on business by a foreign company in a province, see *Standard Ideal Co.* v. *Standard Sanitary Manufacturing Co.*, [1911] A. C. 78, 83-4.

[83] (1887) 12 App. Cas. at pp. 586-7.

nection, pointed out the contrast between provincial powers in Canada, and State powers in the United States.[84] And in *Great North Western Telegraph Co.* v. *Fortier*,[85] the Quebec Court of King's Bench held, on the authority of this case, that a Quebec Act imposing an annual tax of $2,000 upon every telegraph company having a paid-up capital exceeding $50,000, and operating a telegraph line for the use of the public in the province doing business therein, was *intra vires.* It was in vain sought to distinguish the case of a telegraph company from the case of a bank.

As to Dominion railways, in *Canadian Pacific R. W. Co.* v. *Corporation of Bonsecours,*[86] the Judicial Committee expressly say: "The British North America Act, whilst it gives the legislative control of the appellants' railway to the parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. . It is, *inter alia,* reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes."

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[84] See *supra*, pp. 30-1. In *Town of Windsor* v. *Commercial Bank of Windsor* (1882), 3 R. & G. 420, 427, Weatherbe, J., held *intra vires* a provincial Act imposing a tax on the Dominion notes held by a bank as a portion of its cash reserve, under the Dominion Act relating to banks and banking. And see per Torrance, J., in *Angers* v. *Queen Insurance Co.* (1877), 21 L. C. J. at p. 81; *Heneker* v. *Bank of Montreal* (1895), R. J. Q. 7 S. C. at p. 262.

[85] (1903) R. J. Q. 12 K. B. 405.

[86] [1889] A. C. 367, at pp. 372-3. As to this case see, also, *supra*, p. 356.

What the Provinces can tax (continued).—Dominion licensees.—That the provinces can tax brewers licensed by the Dominion Government is established by the Privy Council decision in *Brewers and Maltsters Association of Ontario* v. *Attorney-General of Ontario,*[87] wherein they held, affirming the decision of the Ontario Court of Appeal,[88] that an Ontario Act requiring every brewer, distiller, or other person, though duly licensed by the Government of Canada for the manufacture and sale of fermented, spirituous, and other liquors, to take out licenses to sell the liquors manufactured by them, and pay a license fee therefor, was *intra vires.* So in *Fortier* v. *Lambe,*[89] the Supreme Court held *intra vires* a Quebec Act imposing a license fee on every trader doing business in Montreal by wholesale, or by wholesale and retail.

Similarly, in *Attorney-General of Manitoba* v. *Manitoba License Holders' Association,*[90] again, the Privy Council point out (pp. 78-80) that matters which are substantially of local or private interest in a province " are not excluded from the category of matters of a merely local or private nature," because legislation dealing with them . . . may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades."[91]

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[87] [1897] A. C. 231. Followed, *Rex* v. *Neiderstadt* (1905), 11 B. C. 347.

[88] January 14th, 1896, unreported. Their lordships followed their prior decision in *Regina* v. *Halliday* (1893), 21 O. A. R. 42.

[89] (1895) 25 S. C. R. 422. As to the distinction between wholesale and retail, see *supra*, p. 204, n., and *infra*, pp. 436-8.

[90] [1902] A. C. 73. See *supra*, pp 190-1.

3. The borrowing of money on the sole credit of the Province.

4. Provincial offices and officers.

In 1887 the Ontario Government submitted to Sir Horace Davey and Mr. Haldane, for their opinion, the question whether a lieutenant-governor of a province in Canada has power to appoint Queen's Counsel; and whether a provincial legislature has power to authorize the lieutenant-governor to make such appointments. They advised that the appointment of Queen's Counsel is not a mere dignity or honour, but is the appointment to an office within this subsection, and that, therefore, a provincial legislature has power to authorize the lieutenant-governor to make such appointments for the purpose of the provincial Courts; and that, apart from this, under section 134 of the British North America Act, the Lieutenant-Governor of Ontario and Quebec can create Queen's Counsel for the purposes of the provincial Courts.[92] This has now been confirmed by the decision of the Privy Council in the Queen's Counsel case.[93]

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[91] That an imposition under a provincial Act under the name of 'interest' may be really a tax, see *Lynch* v. *Canada North-West Land Co.* (1891), 19 S. C. R. 204, *supra*, p. 274.

[92] See Appendix of Statutes and Orders in Council.

[93] *Attorney-General for the Dominion* v. *Attorney-General for Ontario* (*the Queen Counsel Case*), [1898] A. C. 247. See, also, *Lenoir* v. *Ritchie* (1879), 3 S. C. R. 575, *supra*, p. 29; and Legislative Power in Canada, pp. 88-9, 133-5.

5. The management and sale of the public lands belonging to the province, and of the timber and wood thereon.[94]

In the *Fisheries* case,[95] the Judicial Committee say: "Whilst in their lordships' opinion, all restrictions or limitations by which public rights of fishing are sought to be limited or controlled can be the subject of Dominion legislation only, it does not follow that the legislation of provincial legislatures is not competent merely because it may have relation to fisheries. For example . . . the terms and conditions upon which the fisheries which are the property of the province, may be granted, leased, or otherwise disposed of, and the rights which consistently with any general regulations respecting fisheries enacted by the Dominion parliament, may be conferred therein, appear proper subjects of provincial legislation, either under class 5 of section 92, 'the management and sale of public lands,' or under the class 'property and civil rights.' Such legislation deals directly with property, its disposal, and the rights to be enjoyed in respect of it, and was not, in their lordships' opinion, intended to be within the scope of the class 'Fisheries' as that word is used in section 91."

In *Smylie* v. *The Queen*,[96] it was held that an Ontario Act making applicable to timber licenses the condition approved by Order-in-

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[94] As to the distribution of the public property under the British North America Act, see *infra*, chapter xxix.

[95] *Attorney-General of the Dominion* v. *Attorney-General of the Provinces*, [1898] A. C. 700, at pp. 715-6.

[96] (1900) 31 O. R. 202, 27 O. A. R. 172.

Council, that all pine timber cut under such licenses shall be manufactured into sawn lumber in Canada, is *intra vires,* and not, as contended, an infringement of the Dominion jurisdiction over trade and commerce, the Court pointing out that the legislature was dealing only with the public property of the province, and dictating the terms on which it might be acquired, and that No. 5 of section 92 gives the provincial legislatures exclusive jurisdiction over 'the management and sale of the public lands belonging to the province, and of the timber and wood thereon.'[97]

6. The establishment, maintenance, and management of public and reformatory prisons in and for the province.

7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals.

8. Municipal institutions in the province.

General meaning of this clause.—A good deal of confusion and uncertainty at one time surrounded the interpretation of this provincial power owing to the view taken by many Canadian judges that it depended upon the municipal institutions which existed, or the powers which were exercised by municipal corporations, in this, that, or the other province, before Confederation.[98] The Privy Council has, however, given a very simple and lucid explanation of it in the Liquor Prohibition Appeal, 1895,[99] by holding that it " simply gives provincial legislatures the right to create a legal body for the management of municipal affairs." And there had been premonitions of this view in what took place on the arguments before the Privy Council in two previous cases. Thus on the argument in *Hodge* v. *The Queen,* in 1883,[100] the following took place with reference to the contention that under this power, the provincial legislatures could regulate the sale of liquors:

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[97] As to Indian lands, see *supra*, pp. 296-303; *infra*, pp. 710-721. As to the Dominion parliament authorizing expropriation of provincial Crown lands by Dominion railway companies, see *supra*, pp. 343-4.

J. W. Jeune: " The circumstance that the municipalities exercised the power before Confederation proves nothing."

Sir Robert Couch: " It does not show it was part of the municipal institutions."

Sir Robert Collier: " It is not a question of what they exercised before Confederation. We have only to deal with the statute."

And on the argument before the Judicial Committee in regard to the Dominion License Acts 1883 and 1884, Sir Farrer Herschel, as he then was, of counsel for the Dominion, discussing this, No. 8 of section 92, says:[101] " That cannot mean you may establish municipal bodies, and give them any and every power you please, or even give them every power which has ever been exercised by municipal bodies in Canada. The argument in the Court below was this: You find that some municipal bodies in some of the provinces of Canada before the Dominion Act have dealt with this question of the liquor traffic. Therefore when you give exclusive legislation with regard to municipal institutions, you give them exclusive power to create municipal bodies, and you give those municipal bodies, so created, exclusive power over this particular subject. My lords, I apprehend that that really is an argument that will not bear investigation, because, of course, the very object of this Act was to take away from the provincial legislatures some of the powers which they had before possessed, and to confer those powers upon the central Parliament, and, therefore, to say that they must necessarily have all the powers of legislation which before they could exercise through their municipal bodies is an argument which cannot be sustained. I should submit that the exclusive legislation in regard to municipal institutions enables them to create municipal institutions, and to give those municipal bodies any powers which come fairly within the subjects with which they are entitled to deal, but that unless you can find from some other provisions here that it is a subject with which they are entitled to deal, the power to create municipal institutions cannot give them the power to enable those municipal institutions to deal exclusively with a subject of legislation which is nowhere else exclusively committed to them." Whereupon the Lord Chancellor observes that he would have thought that No. 8 of section 92 meant the creation of municipal institutions, how many they were to consist of, and how they were to be elected.

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[98] For cases illustrating this, see Legislative Power in Canada, pp. 45-6, 59-61, 706, n. 1.

[99] *Attorney-General of Ontario* v. *Attorney-General of the Dominion,* [1896] A. C. at pp. 363-4.

[100] Dom. Sess. Papers, 1884, vol. 17, No. 30, at p. 67.

[101] The writer has had an opportunity of perusing a transcript of the Shorthand Notes of this argument.

Provincial legislatures can delegate powers to municipalities.—In *Hodge* v. *The Queen*,[102] the Privy Council held that within the limits of section 92, provincial legislatures are supreme,[103] and can confide to a municipal institution or body of their own creation authority to make by-laws, or resolutions, as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect, saying: "It is obvious that such an object is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out may become oppressive, or absolutely fail."

And have all other necessarily incidental powers in respect to municipal institutions.—So Bain, J., says in *Schultz* v. *City of Winnipeg*,[104] that in giving provincial legislatures exclusive powers to make laws in relation to municipal institutions, power was, of course, given to make all such laws as would be reasonably necessary to establish, carry on, and work such institutions. Thus in *Reg. ex rel. McGuire* v. *Birkett*,[105] it was held that the provincial legislatures had power to invest the Master in Chambers at Toronto with authority to try controverted municipal election cases, for, as observed by MacMahon, J. (p. 173): " As the provincial legislature has the exclusive right to make laws relating to municipal institutions, it carries with it the authority to create the tribunal for the trial of contested elections." No. 8 is here, of course, supplemented by No. 14, ' the administration of justice in the province;' and so, in *Clarke* v. *Jacques,*[106] it was held that by virtue of these two powers, the provincial legislature might regulate the matter of appeals in controverted municipal elections.

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[102] (1883) 9 App. Cas. 117, at p. 132.

[103] See *supra*, pp. 64-73.

[104] (1889) 6 Man. at p. 57.

[105] (1891) 21 O. R. at p. 162.

Discriminating against aliens.[107]—A British Columbia Act of 1900, whereby it was enacted that no Chinaman, Japanese, or Indian should be entitled to vote at any municipal election for the election of mayor or alderman, was allowed to go into operation, on the ground, apparently, that it was *intra vires* under section 92 of the Federation Act; and that the rights or privileges of the Japanese residents of British Columbia, if prejudicially affected, were not sufficiently so to warrant interference.[108] But in a despatch from the Colonial Office to the Foreign Office of August 8th, 1901, we find the opinion expressed that such an Act is *ultra vires;* and No. 24 of section 91 (' Indians and land reserved for Indians '), as well as item 25 (' naturalization and aliens '), is curiously enough referred to.[109]

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[106] (1900) R. J. Q. 9 Q. B. 238.

[107] See *supra*, pp. 303-312.

[108] Provincial Legislation, 1899-1900, p. 139.

[109] *Ibid.*, p. 144. See *supra*, p. 388; and *infra*, p. 442.

Dominion power over municipal corporations.—In *In re Canadian Pacific R. W. Co. and County and Township of York*,[110] in connection with the Dominion power to compel municipalities to contribute to the cost of protecting railway crossings over federal railways,[111] Rose, J., says: " It must be borne in mind that when the parliament of Canada is legislating respecting any subject within its exclusive legislative authority, its jurisdiction and powers cannot be affected, limited, or controlled by any provincial legislation; it deals with the Dominion as a whole, irrespective of any territorial divisions, municipal or otherwise.[112] Therefore, if a provincial legislature sees fit to create a municipal corporation, and to vest in such corporation highways or lands, such legislation manifestly cannot prevent the parliament of Canada from dealing with such lands so vested in such corporation, and the corporation in which they are vested, in the same way and manner as if such lands had been in the hands of private citizens."

The cases, again, of *Hart* v. *Corporation of the County of Missisquoi*,[113] *Cooey* v. *Municipality of the County of Brome*,[114] and *Township of Compton* v. *Simoneau*,[115] suggest the possibility of powers and functions being conferred upon municipal corporations by the Dominion parliament, in respect to matters not of provincial competency under the British North America Act. In *Cooey* v. *Municipality of the County of Brome*,[116] Dunkin, J., observes: "Each provincial legislature, alone, can create municipalities, properly so called, establish their functionaries, and assign them their proper duties and their powers, but always within the limits of its own. Whether or not it can render them incapable of other duties and powers to be delegated by Parliament, is a question that need not here be considered." [117] And in *In re Prohibitory Liquor Laws*,[118] Sedgewick, J., says: "Regulations made by Dominion law as well as by local law must be enforced by some sort of machinery. Parliament, I think, may use existing municipal machinery for this purpose; may in respect to those subjects committed to it, such, *e.g.*, as weights and measures, the fisheries inspection, navigation, etc., give to municipal councils power to make by-laws." But it would seem from *Grand Trunk R. W. Co.* v. *City of Toronto*,[119] that the Dominion parliament cannot give new corporate powers to municipal corporations, or confer upon them capacities which the provincial legislation has not given them, *e.g.*, the legal capacity to acquire and make new streets across Dominion railways.[120]

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[110] (1896) 27 O. R. 559, at p. 569.

[111] As to which see now *City of Toronto* v. *Canadian Pacific R. W. Co.*, [1908] A. C. 54; and *supra*, pp. 170-2.

[112] As to this, see *supra*, pp. 123-7.

[113] (1876) 3 Q. L. R. 170.

[114] (1872) 21 L. C. J. 182.

[115] (1891) 14 L. N. 347.

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[116] 21 L. C. J. at p. 186.

[117] Under No. 8 of section 92, in conjunction with No. 14 ('the administration of justice in the province') the provincial legislature may provide for the trial of contested municipal elections: *Reg. ex rel. McGuire* v. *Birkett* (1891), 21 O. R. 162; *Crowe* v. *McCurdy* (1885), 18 N. S. 301; and regulate the matter of appeals therein: *Clarke* v. *Jacques* (1900), R. J. Q. 9 Q. B. 238.

[118] (1885) 24 S. C. R. at p. 247. Mr. Clements cites the Canada Temperance Act as one example of powers conferred and duties imposed upon municipalities by federal law (Law of Canadian Constitution, 2nd ed., p. 265, n. 4.)

[119] (1900) 32 O. R. 120, 125.

9. Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes.

'Other licenses.' — Privy Council decisions have now removed several points of uncertainty in respect to the proper construction of this subsection, and the scope of the power by it conferred on provincial legislatures. To begin with, many judges in our own Courts,[121] though not all,[122] had felt themselves constrained to interpret 'other licenses' by the rule of *ejusdem generis*. In *Russell* v. *The Queen*,[123] however, the Judicial Committee indicated that, in their view, these words did not refer only to licenses

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[120] See, however, *supra*, pp. 354-5. As to Dominion Companies, incorporated under the enumerated classes of powers in section 91, being exempt from municipal control in respect to the exercise of their charter powers, see *supra*, pp. 339-343.

[121] For cases, see Legislative Power in Canada, pp. 27, n. 1; 726, n. 2. To the cases there referred to may be added *City of Halifax* v. *Western Assurance Co.* (1885), 18 N. S. 387.

[122] For cases, see *ibid.* In *Lee* v. *de Montigny* (1899), R. J. Q. 15 S. C. 607, Langelier, J., held that a provincial Act authorizing the City of Montreal to require laundries to take out a license was *intra vires*, resting the right, erroneously as it is, with deference, submitted, on No. 8 of section 92, as relating to municipal institutions. See *supra*, pp. 426-9. In *Re Foster and Township of Raleigh* (1910), 22 O. L. R. 26, 342, a provincial Act exacting payment of an annual license fee for keeping billiard tables for hire was held valid.

[123] (1882) 9 App. Cas. 829.

ejusdem generis as the shop, saloon, tavern, and auctioneer licenses expressly mentioned (if indeed these can be comprised within any one genus), for they speak there *obiter* of " licenses granted under the authority of sub-section 9, by the provincial legislature, for the sale or carrying of arms." And in the *Fisheries* case,[124] they speak of provincial legislatures being able to impose the obligation of obtaining a license, as a condition of the right to fish, in order to raise a revenue for provincial purposes.[125] Finally, in the *Brewers and Maltsters Association* case,[126] going beyond what was absolutely necessary to dispose of the appeal, they say: " Their lordships were not satisfied by the argument of the learned counsel for the appellants that the license which the enactment renders necessary " (*sc.* a license on brewers and distillers to sell wholesale within the province), " is not a license within the meaning of sub-section 9 of section 92. They do not doubt that general words may be restrained to things of the same kind as those particularized, but they are unable to see what is the genus which would include ' shop, saloon, tavern, and auctioneer ' licenses, and which would exclude brewers' and distillers' licenses;" and thus they destroy the authority of *Severn* v. *The Queen*,[127] upon the one point on which, if any, its authority remained unimpaired.[128]

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[124] [1898] A. C. 700.

[125] And see *International Text Book Co.* v. *Brown* (1907), 13 O. L. R. 644.

[126] [1897] A. C. 231.

[127] (1878) 2 S. C. R. 70.

[128] A provincial legislature, legislating to prevent the sale of intoxicating liquor without a license, may prohibit within de-

Taxation by license is direct taxation. — Again some judges in Canadian Courts had expressed the view that taxation by means of licenses under this sub-section was indirect taxation,[129] whereas, as has been already pointed out, in the *Brewers and Maltsters Association* case, the Privy Council has decided that it is direct taxation, within No. 2 of section 92.[130] With deference, it is submitted that the probable explanation of the sub-section under consideration is that it was intended by it to authorize the provinces to raise a revenue by the licenses referred to, although some doubt might exist as to whether this was not indirect taxation.[131] And that provincial legislatures must not, under colour of licenses, tax indirectly, is declared by the judgment of the Privy Council, in *Attorney-General of Quebec* v. *Queen Insurance Co.*,[132] where it was held that a certain Quebec Act, entitled ' An Act to compel assurers to take out a license,' and which purported to be, on the face of it, an exercise of the power conferred by No. 9 of section 92, was not, in substance, a license Act at all, but a simple Stamp Act on policies, and was indirect taxation,

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fined areas the sale of any liquid containing any alcohol at all, even though not in intoxicating quantities: *The King* v. *Bigelow* (1907), 41 N. S. 499.

[129] See Legislative Power in Canada, p. 361, n. 2.

[130] *Supra*, pp. 394-6.

[131] And so per Spragge, C.J., in *Regina* v. *Frawley* (1882), 7 O. A. R. at p. 264; per Maclaren, Q.C., *arguendo* in *In re Prohibitory Liquor Laws* (1895), 24 S. C. R. at p. 179; per Davey, Q.C., *arguendo* in the Matter of the Dominion License Acts, 1883-4: Transscript from Marten and Meredith's Shorthand Notes, at pp. 126, 131.

[132] (1878) 3 App. Cas. 1090.

and *ultra vires.* As a matter of fact, the Act did not compel the supposed licensee to take out, or pay for, a license, but merely provided that ' the price of such license ' should consist of an adhesive stamp to be paid in respect to each transaction, not by the licensee, but by the person who dealt with him. And in the *Brewers and Maltsters Association* case, their lordships say: " If the legislature were under the guise of direct taxation, to seek to impose indirect taxation, nothing that their lordships have decided or said in the present case would fetter any tribunal that might have to deal with such a case if it should ever arise."

Applicable to wholesale as well as retail businesses.—Again it had been held by the Supreme Court,[133] that this power of taxing by way of licenses did not authorize a provincial legislature to impose a license fee on brewers, though, of course, it did a tax upon retail shop, saloon, and tavern keepers. And in several provincial Courts, judges had expressed the view that wholesale trade had a quasi-national, rather than municipal character, and comprised the trade and commerce of the country in some fuller sense than the retail trade; and that, thus, a line of cleavage between Dominion and provincial powers was to be found in the distinction between wholesale and retail trade.[134] But in *The Queen* v. *McDougall,*[135] Townshend, J., relying on the decision of the Judicial Committee in the Matter of the

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[133] *Severn* v. *The Queen* (1878), 2 S. C. R. 70.

[134] See Legislative Power in Canada, p. 727, n. 3.

[135] (1889) 22 N. S. at p. 491.

Dominion License Acts, 1883-4,[136] says: "The distinction between wholesale and retail so far as making it a test of the respective powers of the two legislatures under the British North America Act, has been abandoned;"[137] for the Board there found that nothing turns, so far as legislative power is concerned, upon the fact that those affected by the statutory provisions in question dealt in wholesale quantities, and not in retail quantities.[138] And in the Liquor Prohibition Appeal, 1895,[139] they, in like manner, draw no distinction whatever between the sellers of liquors in wholesale quantities, and other sellers, and say of the Canada Temperance Act, 1886: "They draw an arbitrary line at eight gallons in the case of beer, and at ten gallons in the case of other intoxicating liquors, with the view of discriminating between wholesale and retail transactions." And now, as we have seen,[140] in *Brewers and Maltsters Association of Ontario* v. *Attorney-General for Ontario*,[141] their lordships have held that the license fees imposed by the Ontario Act before them being direct taxation, the Ontario legislature had power to impose them, although those affected were wholesale dealers, selling by wholesale being defined by the Act, as selling in quantities of not less than five gallon casks, or one dozen bottles, etc., the distinction between wholesale and retail trade being treated, as has always been usual in our statutes and judicial utterances, as depending on the quantity sold.[142] Thus, as in the matter of the Dominion Liquor License Acts, 1883-4, where the object of the legislation was mainly regulation of the liquor traffic, so in the *Brewers and Maltsters Association* case, when the main object of the Act before them was to raise a revenue for provincial purposes, the Privy Council finds nothing turns, so far as legislative power is concerned, upon the fact that those affected by the statutory provisions dealt in wholesale quantities, and not in retail quantities.

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[136] Cas. Dig. S. C. 509.

[137] And so in *Regina* v. *Halliday* (1893), 21 O. A. R. at p. 44, Boyd, C., says that the regulation of the liquor traffic, both wholesale and retail, must now be considered to be a matter of provincial competence.

[138] See further as to the matter of the Dominion License Acts, 1883-4; Legislative Power in Canada, pp. 403-6, 727-9.

[139] [1896] A. C. 348, at pp. 367-8.

[140] *Supra*, pp. 394-6.

[141] [1897] A. C. 231.

'In order to the raising of a revenue.'— The licensing power under sub-section 9, is thus restricted; as has been called attention to in many judgments. Thus in *Severn* v. *The Queen,*[143] Strong, J., says: "The imposition of licenses authorized by this sub-section 9 of section 92 is, it will be observed, confined to licenses for the purposes of revenue, and it is not to be assumed that the provincial legislatures will abuse the power, or exercise it in such a way as to destroy any trade or occupation. Should it appear explicitly on the face of any legislative Act that a license tax was imposed with such an object, it would not be a tax authorized by this section, and it might be liable to be pronounced *extra vires*.'"[144] And so in *Russell* v. *The Queen*,[145] their lordships say: " It is to be observed that the power of granting licenses is not assigned to the provincial legislatures for the purpose of regulating trade, but in order to the raising of a revenue for provincial, local, and municipal purposes."

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[142] What would seem the more essential difference between wholesale and retail trade, namely, that the wholesale merchant supplies the trade, whereas the retailer deals directly with the general public; and whether any line of severance of legislative power can be founded on this distinction, does not appear to have been discussed in any of the cases, except so far as the wholesale merchant in this sense may be identified with the manufacturer, as to whom, in the Liquor Prohibition Appeal, 1895, just referred to, the Privy Council expressed the opinion (at p. 371), that under certain circumstances the provincial legislatures might have power to control his business in the absence of conflicting legislation by the parliament of Canada. They do not hold that the mere fact that he is a wholesale manufacturer, and not a retail dealer, determines under which legislative jurisdiction he falls.

[143] (1878) 2 S. C. R. at pp. 108-9.

Licenses as a method of police regulation.—But, quite apart from No. 9 of section 92 of the Federation Act, there seems nothing to prevent provincial legislatures imposing the necessity of obtaining licenses, as a method of police regulation.[146] And so in *O'Danaher* v. *Peters*,[147] where the New Brunswick Liquor License Act, 1887, was held *intra vires* in imposing the necessity of taking out a license on wholesale sellers of liquor, no mention is made of No. 9 of section 92 at all; but it would seem that the Act was viewed in the light rather of police regulation. And in *Hamil-*

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[144] For other like citations, see Legislative Power in Canada, p. 376, n. 3.

[145] (1882) 7 App. Cas. 829.

[146] As to which, see *infra*, pp. 580-627; *supra*, pp. 206-9.

[147] (1889) 17 S. C. R. 44.

ton Powder Co. v. *Lambe*,[148] a Quebec Act requiring those who stored, or kept, gunpowder in any building, to take out a license under a penalty was upheld as being in the nature of a police regulation, and not as coming within No. 9 of section 92. And in *O'Danaher* v. *Peters*, Taschereau, J., remarks: " Whether he " (the defendant) " sold wholesale or retail is immaterial, it is not because he sold a large quantity that he can claim to have the action against him dismissed;" and Patterson, J., says: " The power of the local legislatures to provide for the issuing of licenses for the sale of spirituous liquors, either in large or small quantities, to limit the number of licenses, and to prohibit, under penalties, the sale of such liquors without a license, cannot now be treated as an open question." And so there would seem no doubt, in accordance with what has already been said as to the distinction between wholesale and retail trade, that, as under the American decisions cited by Ritchie, E.J., in *Keefe* v. *McLennan*,[149] so in Canada, the power of police regulation extends to wholesale trade, though in *Severn* v. *The Queen*,[150] Strong, J., expressed the view, apparently concurred in by Ritchie, and Taschereau, JJ.,[151] though a point not necessary to be decided for the disposition of the case, that the wholesale trade in liquor is not a proper subject of police regulation, though the retail trade of course is.

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[148] (1885) M. L. R. 1 Q. B. 460. See, also, *City of Montreal* v. *Walker* (1885), M. L. R. 1 Q. B. at p. 472.

[149] (1876) 2 R. & C. at p. 12.

[150] (1878) 2 S. C. R. at pp. 105-6.

[151] *Ibid.*, at pp. 100-2, 115. See, also, per Strong, J., in *In re Prohibitory Liquor Laws* (1895), 24 S. C. R. at p. 204.

Not restricted to ante-Confederation licenses.—Some judges have favoured the view that, in taxing by means of licenses under No. 9 of section 92, provincial legislatures are confined to licenses of the same kind as those in existence in the provinces before Confederation.[152] The difficulties of such methods of interpretation of the powers conferred by the British North America Act, have, however, already been pointed out.[153] And the weight of authority seems clearly in favour of the view expressed by Strong, J., in *Severn* v. *The Queen,*[154] who referring to the judgment of Richards, J., in that case, and in *Slavin* v. *Village of Orillia,*[155] says: "I am unable to accede to the doctrine that we are to attribute to the words 'other licenses'" (*sc.* in No. 9 of section 92), "the same meaning as though the expression had been 'such other licenses as were formerly imposed in the province,' or equivalent words. The result of such a construction would be that the same words would have a different meaning in different provinces, and that the several provincial legislatures would have different powers of taxation, though the power is included in the same grant . . I cannot think this was the intention of the Imperial parliament. I think everything indicates that coequal and co-ordinate legislative powers in every particular, were conferred by the Act on the provinces,[156] and I know of no principle of interpretation which would authorize such a reading of the British North America Act as that proposed." [157] And so in the course of the argument in the *Brewers and Maltsters Association* case,[158] Lord Herschell observed: "There is very great difficulty in construing section 92, which applies to all the provinces, and saying that the powers of the provincial legislature would differ according to what had been done by the provinces prior " to Confederation.[159]

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[152] See *Slavin* v. *Village of Orillia* (1875), 36 U. C. R. at p. 176; per Richards, C.J., in *Severn* v. *The Queen* (1878), 2 S. C. R. at p. 87; *Keefe* v. *McLennan* (1876), 2 R. & C. at p. 12. And see Legislative Power in Canada, at pp. 44-49.

[153] *Supra*, pp. 15-16.

[154] (1878) 2 S. C. R. at p. 109.

[155] (1875) 36 U. C. R. 159.

Discriminating against aliens.—In 1900 the British Columbia legislature passed an Act whereby Mongolians and Indians were excluded from those who might sign petitions for liquor licenses, which, though objected to, was not disallowed by the Dominion Government, on the ground, apparently, that it was *intra vires* under section 92 of the Federation Act, and that the rights or privileges of the Japanese residents of British Columbia, if prejudicially affected, were not sufficiently so to warrant interference.[160]

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[156] See *supra*, pp. 159-160.

[157] It must be admitted, so far as Strong, J., is concerned, that in *Huson* v. *Township of South Norwich* (1895), 24 S. C. R. at pp. 150-1, he withdrew from the position he took up in the above passage, and says:—"These observations were not material to the judgment I then gave, which was founded entirely on the 9th sub-section of section 92, and I have now come to the conclusion that they were not well-founded."

[158] [1897] A. C. 231. Manuscript transcript of Marten, Meredith and Henderson's Notes, p. 80.

[159] As to the power of provincial legislatures to require extra-provincial companies to take out licenses before doing business in the province, see *supra*, pp. 373-7.

[160] Provincial Legislation, 1899-1900, at pp. 134-138. And see *supra*, p. 430.

The Dominion, also, can tax and regulate by way of license.—It is, almost, unnecessary to cite authority for the proposition that the Dominion parliament can also tax by way of license. However, in the *Fisheries* case,[161] their lordships say: " In addition to the legislative power conferred by the 12th item of section 91 (' Sea Coast and Inland Fisheries '), the 3rd item of that section confers upon the parliament of Canada the power of raising money by any mode or system of taxation. Their lordships think it is impossible to exclude, as not within this power, the provision imposing a tax by way of license as a condition of the right to fish. It is true that by virtue of section 92, the provincial legislature may impose the obligation to obtain a license in order to raise a revenue for provincial purposes, but this cannot, in their lordships' opinion, derogate from the taxing power of the Dominion parliament, to which they have already called attention. Their lordships are quite sensible of the possible inconveniences, to which attention was called in the course of the arguments, which might arise from the exercise of the right of imposing taxation in respect of the same subject-matter, and within the same area by different authorities. They have no doubt, however, that these would be obviated in practice by the good sense of the legislature concerned."[162] Again, the liquor trade is as much part of the trade and commerce of the country as any other trade, and, therefore, it must be within the power of the Dominion parliament to regulate it, in any manner, and in any degree, which comes within the meaning of No. 2 of section 91 of the British North America Act, 'the regulation of trade and commerce;' and notwithstanding some dicta to the contrary,[163] it seems equally clear that the Dominion parliament in so regulating might do so by means of licenses. Indeed, as Hagarty, C.J.O., observes in *In re* Local Option Act,[164] the Canada Temperance Act, 1878, which the Privy Council held to be *intra vires* of the Dominion parliament in *Russell* v. *The Queen,*[165] itself contemplated the issuing of licenses to brewers and distillers and manufacturers of native wines. And so in the course of the argument before the Judicial Committee in the matter of the Dominion License Acts,[166] Sir Baines Peacock observes: "You could not say that the Parliament could not create a criminal offence for selling liquors without a license in the same way as they might create a similar offence for carrying arms without a license, or manufacturing dynamite without a license." As Palmer, J., says in *Ex parte Donaher,*[167] "constitutional limitations look only to results, and not to the means by which results are reached."

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[161] *Attorney-General for the Dominion* v. *Attorney-General for the Provinces*, [1898] A. C. at pp. 713-4.

[162] See, also, as to both the Dominion parliament and the provincial legislatures having power to tax by way of license: per Ritchie, C.J., in *Severn* v. *The Queen* (1878), 2 S. C. R. at p. 101; per Taschereau, J., in *Angers* v. *The Queen Insurance Co.* (1877), 16 C. L. J. N. S. at pp. 204-5.

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[163] As per Fournier, J., in *Molson* v. *Lambe* (1888) 15 S. C. R. at p. 265. See, also, per Ritchie, C.J., S. C. at p. 259, and per Cartwright, Q.C., *arguendo* in *In re Prohibitory Liquor Laws* (1895), 24 S. C. R. at p. 188.

[164] (1891) 18 O. A. R. at p. 580.

[165] (1882) 9 App. Cas. 829.

[166] Transcript from Shorthand Notes of Marten & Meredith, at p. 140.

[167] (1888) 27 N. B. at p. 590.

10. Local works and undertakings, other than such as are of the following classes:—

(a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province:

(b) Lines of steamships between the province and any British or foreign country:

(c) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

As concerns the sub-divisions (*a*), (*b*) and (*c*) of this sub-section, being the exceptions to the general provincial power in respect to local works and undertakings, these have been fully dealt with under No. 29 of section 91.[168] It remains to note the authorities bearing upon the power to make laws in relation to local works and undertakings not within these excepted classes.

Provincial power to authorize construction of a railway to the limit of a province.—No doubt, as Garrow, J.A., says in *City of Toronto*

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[168] See *supra*, pp. 337-383. As to the Dominion power to withdraw local works and undertakings from provincial jurisdiction, see *supra*, pp. 364-371. As to the Dominion power to control crossings by provincial railways of Dominion railways, see *supra*, pp. 350-353.

v. *Bell Telephone Co.*,[169] speaking of sub-division (*a*) of the clause under consideration: "The moment it appears in the application for a charter, or special Act, that the projected works or undertakings will, when constructed, extend beyond the provincial boundaries, they take their place beside railways, canals, ships, etc., having similar extra-provincial *termini;* and at once become subjects of exclusive Dominion jurisdiction." But the question arises whether a provincial legislature can authorize the construction, or operation, of such works and undertakings as railways, or electric light and power transmission lines, or telephone lines, extending to the provincial boundary. The *European and North American R. W. Co.* v. *Thomas*,[170] brought up this question. There a railway company had been incorporated by a New Brunswick Act, passed prior to Confederation, for the purpose of constructing a railway from St. John to the boundary of the United States, and its charter of incorporation was amended after Confederation by a further provincial Act which it was contended was *ultra vires,* because the railway was a part of a scheme for a continuous railway extending through the province into the State of Maine. The Supreme Court of New Brunswick, however, held, that it was *intra vires* under section 92, No. 10, of the British North America Act, Ritchie, C.J., observing: "We think we have no right to look to the intentions, or anticipations, or doings, of parties outside the provincial legislature, either in the State of Maine, or in the province of New Brunswick, and that the intention of the legislature as expressed in the Act, alone can control us—that the fact of the legislature of the State of Maine authorizing, or its people intending to construct, or actually constructing, a line of railway in that country, cannot in any way affect the authority of our own legislature to legislate on, and deal with, railway undertakings, provided always such railways do not connect the province with any other or others of the provinces, nor extend beyond the limits of the province. This is the simple question, and all we have to consider in determining on the validity of the Act."

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[169] 6 O. L. R. at p. 343. In App. [1905] A. C. 52.

[170] (1871) 1 Pugs. 42.

In *Hewson* v. *Ontario Power Co.*,[171] however, where a question arose, although not material to the decision of the case, as to whether a provincial legislature could grant an electric power company the right to connect its wires with those of United States companies—Davies, J., with whom Sedgewick, J., expressed concurrence, says as to this (p. 608): "It seems clear to me that the legislature could not grant a local company power to connect its wires with those of a local company in any of the other provinces. If it could, each company would cease to be one of a 'local or private nature,' and become interprovincial and general. How then could the legislature grant power to connect the wires of the company it was creating with those of the companies of a foreign country? The local or private company, on such connection taking place, would at once cease to be ' local or private ' within the British North America Act, 1867, and become international. It was agreed that the province has as much right to confer powers beyond its jurisdiction upon the corporation it calls into existence, as the Dominion parliament has beyond Canada. In a certain sense that may be true. But there is a difference and a rational one too. Provincial charters are defined by the British North America Act, 1867, as matters of a local or private nature not connecting the province with any other or others of the provinces, and ' not extending beyond the limits of the province.' Dominion charters are not controlled by any such statutory limitations, and while the exercise of the powers they confer upon a company of connecting at the international boundary line with the works of a foreign company may be subject to the municipal law of that country, and permitted and controlled by the comity of nations, there is no statutory prohibition in the British North America Act preventing the granting of the power by the Canadian parliament to a company it incorporates to connect with a company of the United States at the boundary line." But it seems necessary to point out that No. 10 of section 92 does not speak of undertakings of a ' local and private nature,' as the learned judge appears to imply, but simply of ' local works and undertakings '; and, furthermore, it distinctly implies that the classes indicated by (*a*) and (*b*), are within what it means by ' local works and undertakings,' although they are inter-provincial or extend beyond the limits of the province, and although they are excepted out of the general provincial power, over 'local works and undertakings.' So far, in other words, as the part located within the province is concerned, they may be considered local works and undertakings; but the province cannot make laws in relation to them. The learned judge seems to have had in his mind the form of expression in No. 16 of section 92, 'matters of a merely local or private' nature in the province.

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[171] (1905) 36 S. C. R. 596, 8 O. L. R. 88, 6 O. L. R. 11.

However, in *Dow* v. *Black,*[172] the Supreme Court of New Brunswick held *ultra vires* a provincial Act empowering the majority of the inhabitants of a parish in New Brunswick to raise by local taxation a subsidy designed to promote the construction of a certain railway extending beyond the limits of the province into the State of Maine, but already authorized by statute prior to Confederation, upon the ground that it was legislation in relation to a local work or undertaking extending beyond the limits of the province within No. 10 (*a*) of section 92. The judgment of the Privy Council on appeal in this case[173] does not help us, because they took quite a different view of the nature of the Act in question, holding it valid as direct taxation under No. 2 of section 92.[174] But Ministers of Justice have repeatedly questioned the competency of a province to authorize the construction or operation of a railway to the boundary line of a province, or having its two *termini* upon the boundary, though abstaining from disallowance, and leaving the matter to the determination of the Courts. Thus in a report of January 5th, 1901, in reference to certain British Columbia statutes, the Minister of Justice quotes the exception No. 10 (*a*) and says: " In view of the fact that the works and undertakings with regard to which a province may legislate must be local, and having regard to the exception quoted, it seems questionable to the undersigned whether it is competent to the province to authorize the construction or operation of a railway to the boundary line of a province, or having its two *termini* upon the boundary. The undersigned does not on that account recommend the disallowance of these statutes, but he commends the matter to the consideration of the provincial government, and the companies concerned, leaving the question to the determination of the Courts, if necessary.[175]

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[172] (1873) 14 N. B. 300, *sub nom. The Queen* v. *Dow.*

[173] (1875) L. R. 6 P. C. 272.

[174] See *supra*, p. 400.

And when in 1901, the British Columbia legislature assumed to confer authority upon the Crow's Nest Southern Railway Company to construct, and operate, railways connecting a point upon the boundary between British Columbia and the United States, with two points upon the boundary between British Columbia and the North-West Territories, the Minister of Justice, in a report of September 19th, 1901, observes that the power of a provincial legislature to authorize such works depends upon the interpretation of No. 10 of section 92 of the British North America Act, and upon " whether upon the fair construction of all the provisions of sections 91 and 92 of that Act, a provincial legislature can be held to have authority to provide for the construction and operation of railways running through the province, and connecting the United States with the province, and the other portions of the Dominion." He continues: " It would seem to be certain that if the lines of railways in question occupied the same relation to two provinces of the Dominion which they do to the United States and the North-West Territories, the Act would be *ultra vires,* but the United States is a foreign country, and the North-West Territories are not a province, so that these undertakings do not fall within the letter of the express exception above quoted " (*i.e.,* that in item 10 (*a*) of section 92). " It is doubtful, however, whether works making such connection can be considered local in their character, and, therefore, within the power conferred. It is observed, also, that Parliament is given exclusive power to legislate with regard to ferries between a province, and any British or foreign country, or between two provinces; that lines of steamships between any British or foreign country are excepted from provincial power, and having regard to the intention and scope of the section defining the respective authority of Parliament and the legislatures, it would seem to be anomalous that a legislature should authorize the construction of lines of railway such as those in question. Similar objections have heretofore been stated with regard to provincial railways touching the international or provincial boundaries, but it has not been considered in such cases that the public interest demanded disallowance, because of the facilities afforded for raising these questions in the Court where they may be judicially determined."[176]

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[175] Provincial Legislation, 1899-1900, p. 138.

Perhaps, in view of this state of the authorities, and in spite of the fact that it seems to have become a sort of tradition in the Department of Justice, to object to provincial Acts authorizing the construction of a railway to the boundary line of a province, it may be here submitted, with all proper deference, that such Acts are *intra vires;* and the same would, of course, apply to Acts authorizing the construction of canals, telegraphs, telephones, or electric power transmission lines to the boundary of the province. The plenary powers of provincial legislatures are not to be restricted by construction,[177] save so far as is necessary to allow for the enumerated Dominion powers under section 91;[178] and what Nos. 10 (*a*) and (*b*) of section 92 except from provincial power, and No. 29 of section 91 places under Dominion power, are such lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings as themselves connect the province with any other or others of the provinces, or extend beyond the limits of the province: and if the local work or undertaking comes to an end at the boundary, it cannot be said to do this; although the connection or extension may be made by another work or undertaking which meets it at the boundary.

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[176] Provincial Legislation, 1901-1903, p. 58. See also report of November 24th, 1902, on statutes of New Brunswick, and report of December 31st, 1901, on statutes of Manitoba: Provincial Legislation, 1901-1903, pp. 34, 36; also report April 29th, 1909, on Saskatchewan Statutes.

[177] See *supra*, pp. 64-74.

[178] See *supra*, pp. 112-118; 315-6; 389.

Interference with Dominion lands. — We have seen that the Dominion parliament can authorize a federal railway company to expropriate and cross provincial Crown lands,[179] but it by no means follows that a provincial legislature could, quite apart from any question of Dominion veto, authorize a provincial railway company to expropriate and cross Dominion Crown Lands. No. 1 of section 91, which gives the Dominion parliament the exclusive power to make laws in relation to ' the public debt and property,' coupled with the *non obstante* clause of that section, would certainly seem to forbid this. And so in his report of July 4th, 1887,[180] with reference to a Manitoba Act respecting the Red River Valley railway, by which power was given to appropriate so much of the public lands as should be deemed necessary for the purposes of the railway, the late Sir John Thompson pointed out that the public lands of Manitoba were, for the most part, and with the exception of those especially transferred to the province, vested in Her Majesty, in the right of the Dominion; and stated that it was not competent for the legislature of that province to authorize any one to enter upon, and to appropriate for any purpose, the lands so vested in Her Majesty in right of the Dominion, and accordingly recommended the disallowance of the Act, which was disallowed accordingly.[180a]

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[179] *Supra*, pp. 343-4.

[180] Hodgins' Provincial Legislation, 1867-1895, at pp. 855-6.

[180a] As to public lands in Manitoba now, see *infra*, p. 708, n.

Power to legislate as to bonds of provincial railways held by persons domiciled abroad.—In *Jones* v. *Canada Central R. W. Co.*,[181] Osler, J., held that, though a debenture bond of an Ontario railway company might, when the holder resided in England, be properly held to be a debt domiciled out of the province, and so not within the provincial jurisdiction to affect under No. 13 of section 92, ' property and civil rights in the province '; yet that the company in question, being a local work or undertaking within the meaning of subs. 10 of section 92, such provincial legislature had jurisdiction to legislate in respect to such a debt in carrying out by statute a scheme for the financial re-organization of the company; and that its powers were not paralyzed merely because some or all of the debts payable were payable to creditors resident outside of the province: and, therefore, not property or civil rights in the province. He says,[182] somewhat vaguely: " It is well settled that the Dominion parliament may legislate with respect to property and civil rights within the province where it becomes necessary to do so for the purpose of legislating generally and effectually in relation to matters exclusively within their own legislative authority. If the powers conferred upon the provincial legislatures are to be effectually exercised, they must, I think, receive a not less liberal construction." To be a little more precise, it is to be observed that to make laws in relation to debenture bonds of provincial railway companies which are held and owned abroad does not appear to come within any of the enumerated classes of Dominion subjects in section 91, but would, perhaps, be within the power of the Dominion parliament, under its general residuary power of legislation:[183] but so far from this residuary power of legislation residing in the Dominion, 'notwithstanding anything assigned to the province,' we have seen[184] that exactly the reverse is the case, namely, that that power is given only in relation to matters not coming within the classes of subjects assigned exclusively to the provinces; and, therefore, the provinces might be held to have power when legislating on one of the classes of subjects enumerated in section 92, incidentally to invade this area, although, as has already been stated,[185] there seems no authority going so far as to impute to the provinces the right actually to invade Dominion territory comprised in the enumerated subjects for the purpose of provisions ancillary to one of their own Acts.

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[181] (1881) 46 U. C. R. 250.

[182] At p. 260. *Cf.* per Savary, Co.J., in *In re Killam* (1878), 14 C. L. J. N. S. p. 242. See, also, now, *Royal Bank of Canada* v. *The King*, [1913] A. C. 283; *infra*, p. 504.

Power to impose condition of Sunday Observance.—In *Kerley* v. *London and Lake Erie Transportation Co.*,[186] Boyd, C., says: "As I read the opinion given upon the special case in 35 S. C. R." (*sc.* in *In re Legislation respecting Abstention from Labour on Sunday*),[186a] "the

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[183] See *supra*, pp. 91-4; 99-101.

[184] See *supra*, pp. 89-94; 140-3.

[185] *Supra*, pp. 180-3.

[186] (1912) 26 O. L. R. 588.

[186a] 35 S. C. R. 581. See *supra*, p. 322, n.

Court intimates that a province has no power to restrict the operation of companies of their own creation to six days in each week, because that restriction seems to be within the views expressed in the Privy Council,[187] and to be regarded as a matter of criminal law, *ultra vires* of the province. See pp. 582 and 592 in answer to question 5. This point, in this limited way, as to purely provincial corporations was not before the lords of the Privy Council, and their guarded deliverance would rather imply that this was one of the questions not passed upon. However, with all proper deference to the judges of the Supreme Court, I cannot regard the opinion expressed on this head, as a judgment binding on me, nor can I accept it as the law. I fail to see why the province may not legally and validly incorporate a railway company in Ontario as a local undertaking with power to operate only on six days in the week. A refusal to allow work on the Sunday would not in this connection savour of the criminal law, but would be a supposed, or an accepted, salutary rule of conduct imposed for the benefit of the workmen, and the better working of the road itself. If the company accept such a charter with such a limitation, wherein is the Constitutional Act offended against? . . . Here is no general criminal intent, but the incorporation of a local concern, over which the province has plenary power of legislation, covering all things and conditions considered expedient and desirable by the incorporating power . . . The power to legislate as to the Lord's Day by the provincial lawmakers, as to railways subject to their legislative authority, is recognized in the Dominion Lord's Day Act, R. S. C. 1906, c. 153, sec. 3 (2).[188] . . . The late decision of the Supreme Court on Sunday law in *Ouimet* v. *Bazin*,[189] is not in point for the present case. It is distinguishable both because it purports to be a general law framed for all persons, and because the case did not involve the question of local corporations over which the province has constitutional power and competence." And so he says of Ontario legislation, enacting that no company operating an electric railway shall operate the same, or employ any person thereon, on Sunday, subject to certain exceptions,—" the legislation is not to be regarded as a section of the criminal law of Canada, but as a particular penal law intended for the regulation of local electric railways within the province;" and he holds it to be *intra vires.*[190]

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[187] *Sc.* in *Attorney-General for Ontario* v. *Hamilton Street R. W. Co.*, [1903] A. C. 524; as to which case, see *supra*, pp. 321-2.

Restriction on employment of aliens.—It is very apposite in connection with the *dicta* of

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[188] See *supra*, pp. 362-4.

[189] (1912) 46 S. C. R. 502.

[190] This judgment has now (May 5th, 1913) been reversed by the Appellate Division, which, however, does not find it necessary to deal with the constitutional point, but proceeds entirely upon the ground that the provincial legislation in question does not apply to the defendant company, which had been incorporated by Dominion Act, and the incorporation of which was exclusively of Dominion competence, in addition to the fact that the incorporating Act specially declared it to be a work for the general advantage of Canada. The judgment of the Appellate Division will be reported in Vol. 28 O. L. R.

Boyd, C., in the above case of *Kerley* v. *London and Lake Erie Transportation Co.,* [191] to refer to the attempts which have been made, recently, in British Columbia to attach to the incorporation or subsidizing of provincial railways the condition that no Chinese or Japanese shall be employed thereon. Thus in 1900 the British Columbia legislature passed an Act granting a subsidy to a certain railway, but providing that no Chinese or Japanese should be employed or permitted to work in the construction or operation of the railway, under a penalty, and the Act was disallowed by the Governor-General in Council.[192]

In the same session the British Columbia legislature passed a number of Acts incorporating railway companies, and other companies, each of which contained a provision, in effect, that Chinese or Japanese persons should not be employed by the company. The Attorney-General of British Columbia in a report, approved on Feb. 8th, 1900, defended these Acts on the ground that "all that is sought to be attained by the legislation in question is that Chinese or Japanese persons shall not be allowed to find employment on works the construction of which has been authorized, or made possible of accomplishment, by the granting of certain privileges or franchises by the legislature. It will, therefore, be seen that the restrictive provisions are merely in the nature of a condition in agreements or contracts between the provincial Government and particular individuals, or companies, whereby certain privileges, franchises, concessions, and, in some cases, also subsidies and guarantees, are granted to such individuals or companies in consideration of only white labour being employed in the works which are the subject-matter of such agreements.'"[193] By a report of April 12th, 1900, the Minister of Justice, while refraining from disallowance, says that he is of the opinion that the above provisions are *ultra vires* of the provincial legislature as affecting aliens, and adds a hint that the same indulgence must not be expected in future.[194]

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[191] (1912) 26 O. L. R. 588.

[192] Provincial Legislation, 1899-1900, pp. 104, 123.

The same Minister, however, speaks much more positively as to such legislation being *ultra vires* in a report of Sept. 19th, 1901, where, referring to a British Columbia Act to incorporate the Crow's Nest Southern R. W. Co., he says: " Section 23 of the Act provides that ' no alien shall be employed on the railway during construction, unless it be demonstrated to the satisfaction of the Lieutenant-Governor in Council that the work cannot be proceeded with without the employment of such aliens.' This provision is manifestly *ultra vires,* and, therefore, harmless; and inasmuch as the undersigned has come to the conclusion that he ought not to recommend disallowance for the other reasons stated in this report, he does not consider it expedient to do so because of the obvious invalidity of this provision relating to aliens.[195]

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[193] Provincial Legislation, 1899-1900, p. 112.

[194] *Ibid.*, pp. 122-3.

[195] Provincial Legislation, 1901-3, p. 58.

Finally, by a report of December 27th, 1901, the Minister takes the decisive step of recommending the disallowance, unless amended in time, of a number of British Columbia Acts incorporating railway companies which contained a provision, in effect, the same as that referred to in his report of September 19th, 1901, just mentioned, saying: "The subject of aliens is clearly within the exclusive authority of Parliament. Immigration is also within Dominion jurisdiction, and it has been, and is, the policy of your Excellency's Government to promote immigration, large sums of money being annually expended from the Dominion Treasury to that end. The efforts of your Excellency's Government would, however, be certainly paralyzed if the immigrant, upon coming to Canada, is to find the way of employment closed to him by provincial legislation. The policy of these enactments is so contrary to that of your Excellency's Government, and the enactments themselves so manifestly *ultra vires,* that the undersigned considers that no course is open to your Excellency's Government, consistently with the public interest, but the exercise of the power of disallowance, unless, indeed, the provincial legislature repeal these provisions."[196] Disallowance, however, became unnecessary as the provincial government agreed to make the necessary amendments.[197]

Provincial corporations subject to Dominion laws.—Provincial corporations are, of course, just as subject to Dominion laws, validly enacted, as individuals are. Thus in *Schoolbred* v. *Clarke*,[198] Patterson, J., says: "The body politic created by any provincial Act of incorporation becomes, like a natural body, subject to the laws of the land. There are a number of subjects over which exclusive legislative jurisdiction is given to the parliament of Canada, as well as others in relation to which the Parliament may make laws for the peace, order, and good government of Canada, the legislation in which must govern all corporate bodies, as well as natural bodies, for example, interest, legal tender, currency, taxation, the criminal law, and bankruptcy and insolvency." Conversely with a corporation created by Act of the old province of Canada, in *Hamilton Powder Co.* v. *Lambe*,[198a] the Quebec Court of Queen's Bench decided that such a company though incorporated with the power to manufacture and sell gunpowder, was, nevertheless, subject to be interfered with as to the privileges so conferred upon it and hitherto enjoyed, by provincial legislation after Confederation requiring it to take out a license as a matter of police regulation in connection with its business.

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[196] Provincial Legislation, 1901-1903, p. 64.

[197] *Ibid.*, pp. 74-75. See *supra*, pp. 48-9.

11. The incorporation of companies with provincial objects.

This clause of section 92 of the British North America Act is concerned with the incorporation of private companies. Such, at least, seems to be its purport. The creation of municipal corporations would fall under No. 8 of section 92; of charitable, and other similar corporations, under No. 7; of what may, perhaps, be called governmental corporations, such as the Hydro-Electric Power Commission of Ontario, under No. 1, No. 4, or No. 14; and of educational corporations under section 95. The question of the proper interpretation of the words 'with provincial objects' has occasioned, however, a considerable divergence of judicial opinion; and, also, been the crucial point in a long-standing contention between the Dominion and provincial authorities. This, and a number of questions connected with it, and dependent on it, as to the respective Dominion and provincial powers in regard to the incorporation of companies, were argued in February, 1913, before the Supreme Court, and stand for judgment and will, no doubt, afterwards, come before the Judicial Committee of the Privy Council, on the reference by the Governor-General in Council, which occasioned the preliminary question of jurisdiction so to refer, now determined affirmatively by the Privy Council, [199] on appeal from the judgment of the Supreme Court.[200] All that can be done in the meantime is to endeavour to state concisely, and correctly, how the authorities stand at the present time.

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[198] (1890) 17 S. C. R. at p. 274. And see *St. Francois Hydraulic Co.* v. *Continental Heat and Light Co.*, [1909] A. C. 194; *supra*, p. 377.

[198a] (1885), M. L. R. 1 Q. B. 460.

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[199] [1912] A. C. 571.

[200] *In re References by the Governor-General in Council* (1910), 43 S. C. R. 536. The questions submitted on this reference are: (1) What limitation exists under the British North America Act, 1867, upon the power of the provincial legislatures to incorporate companies?

(2) Has a company incorporated by a provincial legislature, under the powers conferred in that behalf by section 92, No. 11, of the British North America Act, 1867, power or capacity to do

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business outside the limits of the incorporating province? If so, to what extent and for what purpose?

(3) Has a corporation constituted by a provincial legislature with power to carry on a fire insurance business, there being no stated limitation as to the locality within which the business may be carried on, power or capacity to make and execute contracts: (*a*) within the incorporating province insuring property outside the province; (*b*) outside of the incorporating province insuring property within the province; (*c*) outside of the incorporating province insuring property outside of the province? Has such a corporation power or capacity to insure property situate in a foreign country, or to make an insurance contract within a foreign country? Do the answers to the foregoing inquiries, or any and which of them, depend upon whether or not the owner of the property or risk insured is a citizen or resident of the incorporating province?

(4) If in any or all of the above-mentioned cases (*a*), (*b*) and (*c*) the answer be negative, would the corporation have throughout Canada the power or capacity mentioned in any and which of the said cases on availing itself of the Insurance Act, 1910, 9-10 Edw. VII., c. 32, s. 3, s.-s. 3, D.? Is the said enactment, the Insurance Act, 1910, c. 32, s 3, s.-s. 3, *intra vires* of the parliament of Canada?

(5) Can the powers of a company incorporated by a provincial legislature be enlarged, and to what extent, either as to locality or objects by (*a*) the Dominion parliament; (*b*) the legislature of another province?

(6) Has the legislature of a province power to prohibit companies incorporated by the parliament of Canada from carrying on business within the province unless or until the companies obtain a license so to do from the Government of the province, or other local authority constituted by the legislature, if fees are required to be paid upon the issue of such licenses?

(7) Is it competent to a provincial legislature to restrict a company incorporated by the parliament of Canada for the purpose of trading throughout the whole Dominion in the exercise of the special trading powers as conferred, or to limit the exercise of such powers within the province? Is such a Dominion trading company subject to or governed by the legislation of a province in which it carries out or proposes to carry out its trading powers limiting the nature or kinds of business which corporations not incorporated by the legislature of the province may carry on,

'With provincial objects'—Can a provincial insurance company take risks on property situate outside the province?—The contention that by 'provincial objects' is meant 'public

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or the powers which they may exercise within the province, or imposing conditions which are to be observed or complied with by such corporation before they can engage in business within the province? Can such a company so incorporated by the parliament of Canada be otherwise restricted in the exercise of its corporate powers or capacity, and how, and in what respect by provincial legislation?

Previously to the argument of the above questions before the Supreme Court, the following questions were argued, in November, 1912, before that tribunal on another reference, and also stand for judgment:—

(1) Are sections 4 and 70 of the Insurance Act, 1910, or any or what parts of the said sections *ultra vires* of the parliament of Canada?

(2) Does section 4 of the Insurance Act, 1910, operate to prohibit an insurance company incorporated by a foreign State from carrying on the business of insurance in Canada if such company do not hold a license from the Minister under the said Act, and if such carrying on of the business is confined to a single province?

The following are the sections of the Dominion Insurance Act, 1910, above referred to:—

Sec. 3, sub-sec. 3: 'Any company incorporated by an Act of the legislature of the late province of Canada or by an Act of the legislature of any province now forming part of Canada, which carries on the business of insurance wholly within the limits of the province by the legislature of which it was incorporated, and which is within the exclusive control of the legislature of such province, may, by leave of the Governor in Council, avail itself of the provisions of this Act on complying with the provisions thereof: and if it so avails itself the provisions of this Act shall thereafter apply to it, and such company shall thereafter have the power of transacting its business of insurance throughout Canada.'

Sec. 4: 'In Canada, except as otherwise provided by this Act, no company or underwriters or other person shall solicit or accept any risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry on any business of insurance, or prosecute or maintain any suit, action or proceeding, or file any claim in insolvency provincial objects' was long ago discouraged in the judgment of the Privy Council in *Citizens Assurance Co.* v. *Parsons*;[201] and does not seem to have been ever again revived. Their lordships refer in that connection, in a marked way, to certain Acts of the Dominion parliament in which the power of the provinces to incorporate insurance companies for carrying on business within the provinces is explicitly recognized; and point out that this recognition is directly opposed to such contention. What the phrase does mean

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relating to such business, unless it be done by or on behalf of a company or underwriters holding a license from the Minister.'

Sec. 70 prescribes penalties for—

'Every person who:—

(*a*) In Canada, for or on behalf of any individual underwriter or underwriters, or any insurance company not possessed of a license provided for by this Act in that behalf and still in force, solicits or accepts any risk, or grants any annuity or advertises for, or carries on any business of insurance, or prosecutes or maintains any suit, action, or proceeding, or files any claim in insolvency relating to such insurance, or acting as an insurance agent, receives directly or indirectly any remuneration from any British or foreign unlicensed insurance company or underwriters: or, except as provided for in sec. 139 of this Act, issues or delivers any receipt or policy of insurance, or collects or receives any premium, or inspects any risk, or adjusts any claim; or

(*b*) except only on policies of life insurance issued to persons not resident in Canada at the time of issue, collects any premium in respect of any policy . . .'

By sec. 3, sub-sec. 2 (*b*), the provisions of the Act are not to apply:

(*b*) 'To any company incorporated by an Act of the legislature of the late province of Canada, or by an Act of the legislature of any province now forming part of Canada, which carries on the business of insurance wholly within the limits of the province by the legislature of which it was incorporated, and which is within the exclusive control of the legislature of such province.'

[201] (1881) App. Cas. at p. 116.

was exhaustively considered by five of the judges of the Supreme Court in *Canadian Pacific R. W. Co.* v. *Ottawa Fire Insurance Co.*,[202] although no two of them can, perhaps, be said to have come to precisely the same conclusion. And as four of their lordships now have an opportunity of reconsidering the matter on the reference above mentioned, while an appeal to the Judicial Committee is likely to follow immediately, all that seems necessary now is to endeavour, without making lengthy abstracts from their judgments, to state the interpretations they respectively put upon the words ' with provincial objects ' in *Canadian Pacific Railway Co.* v. *Ottawa Fire Insurance Co.,* above referred to. It should be first stated, however, that the point actually decided by the majority of the Court in that case (Fitzpatrick, C.J., and Davies, J., dissenting), was that a company incorporated under the authority of a provincial legislature to carry on the business of fire insurance is not inherently incapable of entering outside the boundaries of its province of origin into a valid contract of insurance of property, also outside those limits.[203]

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[202] (1907) 39 S. C. R. 405. Reported below, 9 O. L. R. 493, 11 O. L. R. 465; but the constitutional point was not raised or discussed there.

[203] So held previously, in *Colonial Building and Investment Association* v. *Attorney-General of Quebec* (1882), 27 L. C. J. at p. 299; *Clarke* v. *Union Fire Insurance Co.* (1883), 10 O. P. R. 313. And see also *Hewson* v. *Ontario Power Co.* (1905), 36 S. C. R. at p. 604; *Re York County Loan and Savings Co.* (1908), 11 O. W. R. 507; and Legislative Power in Canada, pp. 637-638. On the argument in the matter of References by the Governor-General in Council to the Supreme Court, [1912] A. C. 571, *verbatim* report (Wm. Briggs, Toronto), at p. 47, Lord Atkinson is reported as remarking: "I see it is asked whether a provincial corporation can insure foreign property; that is a question which is not touched by the law of Canada at all."

Fitzpatrick, C.J.,[204] holds that 'provincial objects' in No. 11 of section 92 means "such objects as are within the legislative jurisdiction of a province to effect:" and, at the place cited, he says: "Admittedly the Dominion parliament has the right to create a corporation to carry on business throughout the Dominion, and it appears to me impossible to maintain that a provincial legislature, if it can deal with the incorporation of insurance companies at all, can create a company with powers co-extensive with those conferred by the Dominion on a company incorporated for the purpose of carrying on the business of insurance." Davies, J., holds that the word 'provincial' in the clause in question is to be read in a territorial sense, as opposed to Dominion in the same sense; and expressly says[205] that it does not mean "companies or subjects within provincial legislative jurisdiction." He holds, therefore, that a provincial legislature can only incorporate companies to do insurance business within the province: and[206] that any contract made by such a provincial insurance company out of the province is wholly void, and that "neither the place where the contract was made, nor the ratification of the shareholders, had such been given, nor any comity, or consent, or license, given by any foreign State, or province, could inject vitality into that which in its substance or essence was void and dead." He adds, however, "while the objects and purposes of the company must be confined to the province, things might be legally done outside the province strictly in furtherance of those objects. . . I put it upon the principle that everything necessary to enable a company to carry out, properly and efficiently, the purposes for which it was incorporated is impliedly granted to them, and that if it is necessary for a provincial company, in order fully and effectually to carry out the objects and purposes for which it was incorporated, to purchase abroad the machinery or other articles necessary to enable it to manufacture, including in such the raw material, it could legally do so. But I squarely challenge the proposition that a provincial manufacturing, or trading, or insurance company has the world for its market or business, or that it can carry on its business at all beyond the province, excepting to the extent, and for the legitimate purpose, of enabling it efficiently to carry out the functional purposes of its incorporation within the province by which it was incorporated." Davies, J., then holds that the very essence of the meaning of the phrase 'with provincial objects' is that the corporate business of the company properly so called, must be confined to the area of the province.

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[204] 39 S. C. R. at pp. 412-3.

[205] At p. 424.

[206] At pp. 429-30.

Idington, J., holds,[207] that the intention of the phrase 'with provincial objects' is to distinguish the subjects exclusively assigned to the provinces, from those assigned to the Dominion as the line of incorporating power given, thus approximating to the view of Fitzpatrick, C.J. He says that No. 11 " clearly was pointed at something in the nature of a partition of the sovereign legislative powers between the Dominion and the provinces;" but that this has no bearing on the power of a corporation, once created, to enjoy rights given by the comity of nations. "What happens," he says, "once the corporation is thus created, is that other provinces, or foreign States, either by the comity of nations, or perchance, in case of treaty, by force thereof, recognize the existence of such a corporate body, as a legal entity, doing the like kind of business for the carrying on of which it was created;" and he denies (p. 451), that any distinction can be drawn between the powers of the Dominion parliament and the provincial legislatures in regard to the status of their corporate creations abroad; "either Dominion or provincial corporation stands upon the same footing in a foreign State." At pp. 445-3, he says: "It is not that the comity adds to the power of the corporation, as some seem to suggest this theory implies. It is that any State creating a corporation without restricting its powers is supposed to know as a matter of international law that the same kind of business it enables it to do can then legally be done abroad by this creation, in States that choose to accord it recognition."[208]

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[207] See at pp. 444-8.

Maclennan, J.A.,[209] says: "I think the expression 'provincial objects' is used in contradiction to Dominion objects, and means no more than this: that just as Parliament in incorporating companies must confine itself to Dominion objects, as between the Dominion and other countries, so each province, not only as between itself and other countries, but between itself and the provinces, must confine itself to provincial objects; and as Parliament cannot empower a company to go into another country and there construct a railway, or canal, or telegraph, or telephone line, so neither can a provincial legislature confer any such powers on a company incorporated by it. And as a Dominion company, desiring to exercise such powers in Maine or Michigan, must obtain them from those States, so a company desiring to exercise such powers in more than one province must be incorporated by a province, and then apply for the required powers to the other province, or provinces."

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[208] At p. 455, Idington, J., refers to an Article on the status of Foreign Corporations and the Legislature, in 23 L. Q. Rev. (No. 91), p. 296.

[209] At pp. 457-8.

Lastly,[210] Duff, J.,[211] says: " In this sub-section (*sc.* No. 11 of section 92), " the word ' objects ' seems to be used in the sense in which it is commonly used in relation to the subject dealt with,—the incorporation of companies; . . . and to denote the purposes for which a company is established, or its undertaking as defined by its constitution. . . . The characteristic ' provincial ' which is to mark the objects of such a company, is not necessarily, I think, to be found in every act or transaction of the company,—but, in the undertaking of the company viewed as a whole. If the company is one formed for gain, then the ' objects of the company ' is only another expression for the business of the company—the business by means of which the company, under its constitution, is permitted to acquire that gain; and the question,—Are such and such objects, regarded as the objects of a 'company,' as these words are used in sub-section 11, 'provincial' objects?—is another form of the question:—Would the business of a company constituted with such objects regarded as a whole, fairly come within the description 'provincial?' . . There is, I think, a very real distinction between a company whose undertaking is limited in the manner I have mentioned, and a Dominion company having power to establish itself, and conduct its business to any extent in any one or more of the provinces it may select. . . The constitution and powers of a corporation restricted as to its residence or places of business to one province are mainly the concern of that province; and it seems impossible to find any ground upon which to deny the character 'provincial' to such a company, confined in its administration and as to its residence, to the province of its origin: elsewhere always a foreigner, and a non-resident, foreigner." And in reference to the immediate point in the case before the Court, namely, whether a company incorporated under the authority of a provincial legislature, to carry on the business of fire insurance, is, or is not, entirely incapable of entering outside the boundaries of its province of origin into a valid contract of insurance relating to property also outside those limits,—he cites and comments on *Bank of Toronto* v. *St. Lawrence Fire Insurance Co.,*[212] as the nearest approach to an authority on the point, and that in favour of the provincial insurance company having the capacity to enter into such a contract.

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[210] Girouard, J., did not deal with the constitutional point in his judgment.

[211] At pp. 460, 467, seq.

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[212] [1903] A. C. 59.

In view of this conflict of judicial opinion, the writer may, perhaps, be permitted to submit, in his own way, his own view of the meaning of 'with provincial objects' in No. 11 of section 92, which, if he may say so, without undue presumption, concurs with that expressed by Maclennan, and Duff, JJ., in the above case, according to his understanding of their judgments. It is, then, submitted, with deference, that what No. 11 of section 92 means is that provincial legislatures may incorporate companies whose objects or purposes are provincial in this sense, that, in the first place, they are not such objects and purposes as, under the various sub-sections of section 91 of the British North America Act, the Dominion parliament can alone incorporate companies to carry out; and in the second place, are not such objects and purposes as from their very nature, impliedly or expressly, authorize direct corporate action, as of right, outside the province in order to effectuate them. Thus a province cannot incorporate a company with the object or purpose of banking, or with the object or purpose of establishing a line of steam or other ships, railways, canals, telegraphs, and other works or undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province; and if it incorporates a navigation or shipping company of any kind, it cannot absolve such company from compliance with the

Dominion laws as to navigation and shipping;[213] neither can it incorporate a company with authority under its charter, to carry on an insurance business throughout the Dominion, or throughout two or more provinces thereof, although the right of the Dominion parliament to incorporate such an insurance company rests, not on any of the enumerated powers of section 91, but on the residuary legislative power of the Dominion Parliament, as explained by the Privy Council in *Citizens Insurance Company* v. *Parsons.*[214] The provincial legislature can only create a provincial corporate person; it cannot create a Dominion corporate person.

But, it is submitted, provided provincial legislatures do not transgress the limitations thus marked out, they have precisely the same powers of incorporating companies as the pre-Confederation self-governing colonies, now represented by them, possessed; and there is nothing in the British North America Act, whatever there may, or may not be, in their respective charters, to prevent or forbid such provincial companies operating in other provinces, or in foreign countries, by the grace or comity of such other provinces, or such foreign countries. As Tessier, J., says in *Colonial Building and Investment Association* v. *Attorney-General of the Province of Quebec,*[215] the power of establishing agencies in places outside the province, belongs to a provincial corporation, "as it belongs to every individual whatsoever, providing he submits to the laws of the country in which he establishes that agency."[215a]

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[213] *Queddy River Driving Boom Co.* v. *Davidson* (1883), 10 S. C. R. 222; *In re Provincial Fisheries* (1896), 26 S. C. R. 444, 515, [1898] A. C. at p. 77. See *supra*, pp. 243-5.

[214] (1881) 7 App. Cas. 96, at pp. 116-7.

[215] (1882) 27 L. C. J. at p. 299.

Nor, it is submitted with great deference, is this the same thing as to say that a provincial legislature can create a company with powers co-extensive with those which can be conferred by the Dominion on a company incorporated for the purpose of carrying on a like business, as Fitzpatrick, C.J., seems to say it is, in the passage above quoted from his judgment in *Canadian Pacific R. W. Co.* v. *Ottawa Fire Insurance Co.*[216] The difference, it is submitted, is this. The Dominion parliament can create a corporation with charter rights to operate all over the Dominion, or in two or more provinces thereof, for all legislative power relating to the internal affairs of Canada, which is not vested in the provincial legislatures, is vested in the Dominion parliament.[217] And if the Dominion parliament incorporates such company under and by virtue of its express enumerated powers in section 91, no provincial legislature can forbid it to carry out the objects and purposes expressed in its charter, although provincial legislatures can tax it, when found operating within their boundaries.[218] But if the Dominion incorporation is not under any of those express enumerated powers, but merely under the residuary power, then such company is subject to the laws of any province in which it operates.[219] But a provincial legislature, on the other hand, can only give companies of its incorporation chartered rights to operate within the province; and any business such provincial companies do outside the province, they do by the mere grace and comity of the other provinces, or foreign countries, in which they operate, and, in all respects, subject to the laws thereof.[220]

[215a] For an Article on 'Foreign Partnerships and Corporations in the Province of Quebec,' by E. F. Surveyer, see (1901) 35 Am. L. R. 402, *et seq.*

[216] *Supra*, p. 467.

[217] *Supra*, pp. 96-99; 121.

[218] *Supra*, pp. 339-344; 421. And see *St. Francois Hydraulic Co.* v. *Continental Heat and Light Co.*, [1909] A. C. 194, where it was held that the power conferred by a provincial legislature on an

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industrial company in the Act which incorporates it, to carry on an enterprise to the exclusion of every other company, in a designated territory, is without effect against a company constituted for similar ends by a previous statute of the parliament of Canada. The same, it is submitted, would be the case if the Dominion incorporation was subsequent. See, also, *Kerley* v. *London and Lake Erie Railway and Transportation Co.*, in the Appellate Division (1913), 28 O. L. R.

[219] *Supra*, pp. 371-3. Reference may also usefully be made to a speech of the late Honourable David Mills in the Dominion House of Commons on June 15th, 1899, on the moving of the second reading of the Loan Companies Bill, 62-63 Vict. c. 41, in which he deals with the subject of Dominion loan companies. In the course of it he observes that if a company wishes to have "as of right" the power to exercise its franchises in every province of the Dominion—"its objects are not provincial, and it must look elsewhere than to the legislature of a province for its incorporation." He adds: "It is true that a provincial company may do business in another province than that in which it is incorporated, but it does so as a foreign company. Elsewhere, except in the province in which it is incorporated, it stands upon the footing of a foreign corporation; and most companies, in so far as they can, prefer that their franchises should exist, not as a matter of forbearance, but as of right everywhere in the country in which they intend to carry on their operations." As to their being some objects and purposes, so necessarily provincial in their character that only a province could incorporate companies with them, see *supra*, p. 382, n.

[220] As Meredith, J., says in *Tytler* v. *Canadian Pacific R. W. Co.* (1898), 29 O. R. at p. 657, a Canadian corporation, incorpor-

The views of Ministers of Justice.—It must be admitted, however, that Ministers of Justice have always taken strong ground that companies with power to transact business beyond the limits of the province, including fire and life insurance companies, or marine insurance companies with power to take risks on vessels not touching provincial ports, or on vessels going beyond the limits of the province, though the policies be granted within the limits of the province, or steamship companies for the purpose of running steamers on 'the coast of the province and elsewhere,' are not companies 'with provincial objects' within the meaning of No. 11 of section 92 of the British North America Act.[221]

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ated under federal legislation, cannot be deemed, in any of the provinces, a corporation of foreign origin. As to whether the Dominion parliament can authorise a provincial company to transact business throughout the Dominion, or in foreign countries, see *supra*, p. 381, n.; *infra*, pp. 483-5; and as to provincial corporations being subject to validly enacted Dominion laws, see *supra*, pp. 124; 472-3,

[221] See Legislative Power in Canada, pp. 638-639: to the citations there may be added: report of November 24th, 1902, on an Ontario Act incorporating a company with power to employ steam vessels for transporting goods to any place in Canada; Provincial Legislation, 1901-1903, p. 12; report of November 10th, 1905, on certain Nova Scotia Acts incorporating companies or amending such Acts. some of them being objected to because they authorized the companies to have their head offices out of the province: *Ibid.*, 1904-1906, p. 52, seq.; report of December 18th, 1905, in reference to a New Brunswick Act, providing that a provincial electrical company might, with the consent of the legislature of the State of Maine, sell and supply electricity in that State; and might consolidate and work its franchise with those granted by the State of Maine as one single enterprise: *Ibid.*, pp. 76, 77, 84; report of October 31st, 1907, objecting to a Manitoba Act, because it appeared to empower a trust company to loan money in the province on lands situate outside the province; report of January 30th, 1911, as to a Nova Scotia Act incorporating the Pacific Whaling Co.

Sometimes they have been disposed to insist that provincial Acts of incorporation should contain provisions expressly limiting the business to the province. The Minister of Justice did this in his report of November 10th, 1905, as to certain Nova Scotia Acts;[222] and elicited the following reply from the provincial Attorney-General, which, it is submitted, has much force: "While these Acts of incorporation do not in terms provide that the business of the respective companies shall be carried on only in the province of Nova Scotia, yet as the jurisdiction of the legislature only extends to the province, these Acts empower them only to exercise the powers conferred upon them within the province. With any business transacted by these companies respectively beyond the province the legislature and Courts of Nova Scotia are not concerned beyond the provisions of their Acts of incorporation generally. If these companies undertake to extend their business, make contracts, and avail themselves of the protection of the Courts of any other country, they should be at liberty to do so, when by the laws of comity among nations such corporations are recognized and permitted to make contracts, and to sue and be sued in the Courts. . . To amend these Acts of incorporation so as to expressly confine the exercise of the companies' powers to this province, would be to prohibit and prevent them from taking advantage of the law of comity which is almost universally recognized." The Minister rejoins by a report of June 29th, 1906, in which he seems to uphold the view that the powers of a provincial company must, under No. 11 of section 92, be confined to doing business within the boundaries of the province only, which would accord with the view of Davies, J., in *Canadian Pacific R. W. Co.* v. *Ottawa Fire Insurance Co.*,[223] above mentioned.[224] The Minister did not, however, recommend disallowance.[225] But he expressed the same view of the construction of No. 11, in a letter to the Attorney-General of British Columbia, in reply to one from the latter of April 3rd, 1907, respecting two British Columbia Acts. The provincial Attorney-General had urged that: "What can be done by the comity of States or nations can also, I think, be done by the comity of provinces. A company incorporated by Ontario can obtain under our laws a license authorizing it to carry on business in this province. I am not aware that it has yet been decided that a company incorporated by one province cannot do business in another province provided the other province consents." The Minister of Justice, in his letter in reply, expresses the view that the doctrine of the comity of nations cannot possibly be applied to the case of a provincial corporation, because "provincial corporations being limited by the British North America Act to provincial objects, have no quality which can be recognized by the comity of nations, so far as concerns the carrying on of business, or the making of contracts in any provinces other than the incorporating province. In this case, also, however, he did not recommend disallowance.[226] But in some recent cases, Ministers of Justice have gone so far as to recommend disallowance where provincial legislatures have assumed to authorize companies of their creation to carry on business outside the province.[227]

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[222] So, too, in a report of November 1st, 1905, in reference to certain Manitoba Acts relating to some fire insurance companies, and a land and investment company: Provincial Legislation, 1904-1906, pp. 102-117; and a report on certain Quebec Acts of 1905, *Ibid.*, p. 32.

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[223] (1907) 39 S. C. R. 405, at p. 424.

[224] *Supra*, p. 467; *cf. International, etc., Co.* v. *Registrar* (1913), 9 D. L. R. at p. 298.

[225] Provincial Legislation, 1904-1906, pp. 54-59.

It must be remembered, however, that Ministers of Justice are not judicial functionaries. They are members of the Dominion Government; and naturally lean in favour of upholding federal authority where arguable points arise. And no one can read the reports of Ministers of Justice on provincial legislation without seeing that certain positions become traditional in the Department; and Ministers of Justice seldom feel at liberty to abandon those taken up by their predecessors, unless and until judgments of the Supreme Court, or it may be, of the Judicial Committee of the Privy Council, render them no longer tenable.[227a]

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[226] Provincial Legislation, 1904-1906, pp. 165-6.

[227] Report of December 7th, 1910, as to some Prince Edward Island Acts; report of December 7th, 1910, as to certain Manitoba Acts; report of February 23rd, 1910, as to a New Brunswick Act, and of January 12th, 1911, as to a Quebec Act, in both of which the addition of the words 'of Canada' to the name of a provincial company is expressly objected to as indicating that the company could carry on a general business throughout Canada; report of January 9th, 1911, as to some Saskatchewan Acts incorporating certain loan trust and investment companies, and purporting to give them power to transact business outside the province.

[227a] In this connection the words of Mr. Edward Blake (whose own reports as Minister of Justice are so conspicuous) in the argument in *In re Portage Extension of the Red River Valley*

Provincial incorporation of a body already incorporated with similar powers in another province.—Although the Dominion parliament can alone incorporate companies to carry on business throughout the Dominion, and can alone incorporate companies for objects other than provincial, yet if the view of the law expressed above is correct,[228] there would seem to be no doubt that a provincial corporation existing in one province may be incorporated with similar rights and powers in another province by the legislature of the latter. And so in *Dobie* v. *Temporalities Board*,[229] Dorion, C.J., says: "It can hardly be contested, each local legislature would have power to grant to a body, already incorporated in one province, the same franchises to be exercised within the limits of its own jurisdiction, and all the local legislatures might successively do the same. These corporate rights would not

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Railway, Cass. Sup. Ct. Dig. 487 (printed *in extenso* by A. S. Woodburn, Ottawa, 1888) may well be cited: "I do not understand that even apart from the special circumstances of this case, your lordships would pay any particular attention to the circumstance that the Minister of Justice on an *ex parte* proceeding, without anybody complaining, without his attention having been called to those facts, is to be considered as a judicial authority whose conclusion, when he is advising the Executive,—sometimes, it is whispered, upon political considerations, as well as upon those strictly legal considerations which alone should animate him in the discharge of that duty,—is to be considered by your lordships: (p. 105). These objections, however, to the value of reports of Ministers of Justice as opinions on the law of legislative power in Canada are obviously much more applicable in some cases than in others, and in many would seem not to apply at all. See, also, per Fitzpatrick, C.J., in *Canadian Pacific R. W. Co.* v. *Ottawa Fire Ins. Co.* (1907), 39 S. C. R. at p. 415; per Davies, J., S. C. at p. 432.

[228] See *supra*, pp. 472-5.

[229] (1880), Doutre on the Constitution of Canada, at p. 260.

cease to be civil rights, nor to have provincial objects, for having been successively granted in more than one province of the Dominion." Ministers of Justice, however, have taken up a different position. Thus in 1906, the province of Alberta passed two Acts purporting to authorize two Manitoba companies to carry on their business in Alberta to the same extent as in Manitoba, and as if each company had been incorporated for its corporate purposes by Act of the legislature of Alberta. But by report of December 19th, 1906, the Minister of Justice objected, saying that it seemed to him "very difficult to affirm that the two legislatures can together constitute or enlarge the powers of a corporation so that it may carry on its business equally in each province. This is an authority, which in the opinion of the undersigned, is vested solely in Parliament. The constitution of a company incorporated by Manitoba is not within the legislative jurisdiction of Alberta to enlarge or alter." He, however, allowed the Acts to come into operation, leaving the decision of the question thus raised to the determination of the Courts.[230] And similar objections were raised, in similar cases, by the Minister of Justice in his report of February 12th, 1912, upon a Quebec Act of 1911, to authorize the National Trusts Company, incorporated by Manitoba Act, to do business in the province of Quebec; and in his report, of the same date, in reference to a Saskatchewan Act. But where a Quebec Act of 1907 purported to authorize companies incorporated by other provinces to apply to the Government of Quebec for incorporation of its shareholders in Quebec, Sir Allen Aylesworth, as Minister of Justice, says: "The undersigned does not doubt the power of the legislature of Quebec to incorporate the shareholders of an existing company as a new company for local purposes; but such new corporation could never be other than an entirely distinct and different company from the original company. To transfer to such new company the rights and obligations of the original company, unless with the unanimous consent of its shareholders, and of its creditors, or those interested in the enforcement or preservation of such obligations, might be to destroy the civil rights of all persons interested in the original company, or with whom it had existing dealings."

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[230] Provincial Legislation, 1904-1906, pp. 175-7. *Cf.* report of November 24th, 1902, on an Ontario Act, authorizing a company incorporated by another provincial legislature to do business in it: *ibid.*, pp. 12-13; report of January 8th, 1904, as to certain Manitoba Acts: *ibid.*, p. 44. It is submitted that for one province to give liberty to a company incorporated in another province to do business within its territory, is in no way different to giving any individual from another province liberty to do business in its territory. To avail itself of such liberty might, of course, be *ultra vires* of the company.

Provincial company connecting its wires with those of a local company in another province.—It is likewise impossible, if the view of the law above submitted[231] be correct, to acquiesce in the *dicta* of Davies, J., in *Hewson* v. *Ontario Power Co.*,[232] as to a provincial legislature not being able to give an electric light and power company of its creation, the right to connect its wires with those of a local company in another province, or with those of a company in the United States.

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[231] *Supra*, pp. 472-5.

[232] (1905) 36 S. C. R. at pp. 608-9.

Provincial companies may need Dominion assistance in order to the effectual execution of their corporate purposes.—This is a subject which has already been discussed and illustrated in reference to No. 10 of section 91 of the British North America Act.[233]

But the Dominion parliament cannot enlarge the charter powers of a provincial company.—Thus in *Canadian Pacific Railway Co.* v. *Ottawa Fire Insurance Co.*,[234] dealing with the question whether the Dominion parliament has authority to authorize the Governor-General in Council to permit a company locally incorporated to transact business throughout the Dominion,[234a] or in foreign countries, Fitzpatrick, C.J., says: "If a company is within the exclusive jurisdiction of a province, then the Dominion parliament cannot interfere to extend or limit its powers so long as it remains a provincial company. I concede that the Dominion might make a company a Dominion company; but so long as a company is subject to the provincial legislature, the Dominion has no authority or power to extend or restrict. The Dominion cannot enlarge the Constitution of an Ontario company, or limit the powers locally conferred. The same company cannot be subject, at the same time, to the legislative jurisdiction of the Dominion and of a provincial legislature with respect to its corporate powers." And so, at pp. 433-4, Davies, J., referring to the Dominion Act, 51 Vict. c. 28, which authorizes provincial companies by leave of the Governor-in-Council, and on complying with certain provisions of the Act, to have the power of transacting their business throughout Canada, says: "I cannot see how, or by what authority, the Dominion parliament could alter, extend, or abridge a provincial company's charter. The Imperial Act divides legislative power between the parliament of the Dominion and the legislatures of the provinces. Whatever powers the latter have are exclusive. . . It seems to me that only by the creation of a new entity or corporation could the object sought for be achieved. Comity cannot extend the circumscribed powers of an incorporated company, nor can a foreign legislature by any legislation or system of licensing, enlarge such powers, or make that legal which the charter did not warrant or authorize. It would not be argued that, assuming the powers of this company to be confined to the province of Ontario, the State of Maine could by any possible legislation enlarge those powers short of creating a new company. Nor can I see how the Dominion parliament has any other or greater power to enlarge a provincial company's charter than one of the States of the United States would have."

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[233] *Supra*, pp. 243-4. See Article on Companies Dominion and Provincial (1902), 38 C. L. J. 740; also one on 'Company Incorporation Jurisdiction in Canada,' by R. A. Reid (1912), 32 C. L. T. 749, 944; also one on The Conflict of Control of Corporations (1908), 44 C. L. J. 249.

[234] (1907) 39 S. C. R. at p. 415. As to this case generally, see *supra*, pp. 466-472. As to a statute enlarging powers and extending the business of a company being binding on all the shareholders whether assenting or not to the application for it, see *Canada Car and Manufacturing Co.* v. *Harris* (1875), 24 C. P. 380.

[234a] Sir Allen Aylesworth, as Minister of Justice, expresses very grave doubt as to whether Parliament has any such power, in a report of June 29th, 1906: Hodgins' Prov. Legisl. 1904-6, p. 60. And see *supra*, p. 382, n.

The Dominion parliament may not, under colour of incorporating a Dominion company, infringe the exclusive provincial power under No. 11 of section 92.—There is some little authority, although, as might be expected, very little, bearing upon this proposition. In *Colonial Building and Investment Association* v. *Attorney-General of Quebec,*[235] where the Privy Council held that the mere fact that a Dominion company chose to limit its operations to one province only, did not invalidate its charter, their lordships say: " It is unnecessary to consider what remedy, if any, could be resorted to if the incorporation had been obtained from Parliament with a fraudulent object, for the only evidence given in the case discloses no ground for suggesting fraud in obtaining the Act " (*sc.* of incorporation); and it would seem that the case here suggested is one in which Parliament had been induced, while ostensibly exercising its proper power of incorporating Dominion companies, to, in fact, incorporate a company with a provincial object, thus infringing upon the exclusive jurisdiction of the provinces under No. 11 of section 92.[236] There may, also, be cited in this connection the words of Dorion, C.J., in *Dobie* v. *Temporalities Board,*[237] where he says: "The Dominion parliament could not claim to interfere and grant to a Society incorporated in Quebec the same corporate rights in Ontario, under the pretence that the Society being already incorporated in Quebec, its operations would extend to more than one province, by the new Act of incorporation."

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[235] (1883) 9 App. Cas. at p. 165.

[236] (1880), Doutre in the Constitution of Canada, at p. 260.

Provincial legislation dealing with rights of corporators of a provincial company.—In the course of the argument in *In re Dominion Provident and Endowment Association,*[238] Armour, C.J., is reported as having said: "If the local legislature has power to incorporate the Association, it has power to say what are the rights of the parties under the incorporation;" and, again, at p. 261: "If that legislature has power to incorporate, it has power to deal with rights acquired under the incorporation." The question which arose in that case was as to the power of the Ontario legislature to confer upon the Master in Ordinary the powers it assumed to confer upon him by the Ontario Insurance Corporations Act, 1892, which provided for the appointment of a receiver after cancellation of a corporation's registry under the Act, and enacted that the Master 'shall settle schedules of creditors and contributories, direct the realization of assets, the discharge of liabilities, and the distribution of the surplus . . . . and generally have all the powers which might be exercised on any reference to him under a judgment or order of the High Court.' The Court held the Act *intra vires;* and the above *dicta* of Armour, C.J., must, of course, be understood in the light of the matter before him, which did not involve the question of the power of a provincial legislature, when incorporating a company, to, in any way, impinge upon the Dominion area. For example, the case in no way raised any question of a right in the Ontario legislature to provide for the dissolution of a corporation created by it, by a compulsory process upon insolvency.[239] And we have seen the objections taken by Ministers of Justice to provincial Acts attempting to include a condition against the employment of aliens in the incorporating Acts of railway and other companies.[240] The question of the right of provincial legislatures to import conditions of this sort into the incorporation of provincial companies, cannot be said to have been decided. The writer would submit that they have such power, for that including in a charter of incorporation a condition as to the winding-up of that particular company, is not making a law in relation to bankruptcy and insolvency, or in relation to aliens, within the meaning of section 91 of the British North America Act. In the great majority of the enumerated classes of subjects in section 91, what seems to be contemplated is general legislation upon general subjects. Nevertheless, it must be admitted, in *Quirt* v. *The Queen,*[240a] the Supreme Court held that, by virtue of its powers to make laws in relation to bankruptcy and insolvency, Parliament can provide for the winding up in insolvency of a single institution.[240b]

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[237] (1880), *ibid.* at p. 260, 1 Cart. at pp. 388-9. And see *supra,* pp. 76-82.

[238] (1894), 25 O. R. at p. 620.

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[239] See Legislative Power in Canada, p. 458, n.

[240] See *supra*, pp. 457-460.

[240a] (1891), 19 S. C. R. 510. See *supra*, p. 144.

12. Solemnization of marriage in the province.—This provincial power has been dealt with under No. 26 of section 91.[240c] It may be worth while, however, to add to what is there stated, that the law officers of the Crown in England, in 1869-70, when the question as to the power to legislate upon publication of banns and marriage licenses, was referred to them, observed in their Opinion:—" The phrase, ' the laws respecting the solemnization of marriage in England ' occurs in the preamble of the Marriage Act (Imp. 4 Geo. IV. c. 76), an Act which is very largely connected with matters relating to banns and licenses, and this is, therefore, a strong authority to show that the same words used in the British North America Act, 1867, were intended to have the same meaning.[241]

13. Property and civil rights in the Province. —Must be construed in light of the Dominion powers.[242]—We have seen that in order to construe the general terms in which the classes of subjects of legislation in sections 91 and 92 of the British North America Act are described, both sections and the other parts of the Act must be looked at, to ascertain whether language of a general nature must not, by necessary implication, or reasonable intendment, be modified and limited; for that the British North America Act has to be construed as a whole, and where some specific matter is mentioned as within the exclusive power of one body, Dominion parliament or provincial legislature, as the case may be, which, but for that reference, would fall within the more general description of a subject-matter confined to the other, the statute must be read as excepting it from that general description.[243] And so, as the Privy Council say in *Attorney-General of Ontario* v. *Mercer*,[244]—" The extent of the provincial power of legislation over ' property and civil rights in the province ' cannot be ascertained without at the same time ascertaining the power and rights of the Dominion under sections 91 and 102." [245]

[240b] Mr. Clement (*op. cit.* at p. 165) remarks that Dominion private bill legislation would be prohibited if they can legislate only on general subjects.

[240c] *Supra*, pp. 314-9.

[241] Dom. Sess. Pap. 1877, No. 89, p. 340.

[242] As to the power of provincial legislatures to interfere with vested rights or pass *ex post facto* laws, or laws impairing the obligation of contracts, see *supra*, pp. 82-5. As to how far Dominion corporations are subject to provincial laws in relation to property and civil rights, see *supra*, pp. 339-343; 356-363.

Thus, as Burton, J.A., says in *Hodge* v. *The Queen*,[246] " property and civil rights would comprise the power of regulating contracts of every kind, including bills of exchange and promissory notes. When, therefore, we find the Dominion entrusted with an exclusive power to legislate upon bills and notes, the only way to make the Act consistent is to read this as an exception to the general power granted to the province."

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[243] *Supra*, pp. 112-8; 315-6; 389.

[244] (1883) 8 App. Cas. at p. 776.

[245] S. 102 creates a consolidated revenue fund for Canada out of the duties and revenues over which provincial legislatures at the Union had power of appropriation. See Appendix of Statutes.

[246] (1882) 7 O. A. R. at p. 274.

But many other of the enumerated Dominion powers involve, in a less direct way, the right to affect property and civil rights in the different provinces. Thus in *Cushing* v. *Dupuy,*[247] the Privy Council say:—" It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property and other civil rights. . . It is, therefore, to be presumed, indeed it is a necessary implication, that the Imperial statute in assigning to the Dominion parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure, within the provinces, so far as a general law relating to these subjects may affect them." [248] And in the same way, they point out in *Tennant* v. *The Union Bank of Canada,*[249] that among the enumerated classes of subjects in section 91, are ' patents of invention and discovery,' and ' copyrights,' and that it would be practically impossible for the Dominion parliament to legislate upon either of these subjects without affecting the property and civil rights of individuals in the provinces. As their lordships say in *City of Toronto* v. *Canadian Pacific R. W. Co.*:[250] " The jurisdiction conferred over property and civil rights in the province is quite consistent with a jurisdiction specially reserved to the Dominion in respect of a subject-matter not within the jurisdiction of the province."

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[247] (1880) 5 App. Cas. 409.

[248] *Cf.* their similar language in *Attorney-General of Ontario* v. *Attorney-General of Canada,* [1894] A. C. 189, to which case they make special reference in their subsequent judgment in the Fisheries Case, [1898] A. C. 700, at pp. 715-6. And see *supra,* pp. 164-179; and Legislative Power in Canada, pp. 425-439. In *Quirt* v. *The Queen* (1891), 19 S. C. R. at pp. 521-2, Patterson, J.A., raises the question, where, if the necessity arose in connection with bankruptcy proceedings for curing some irregularity so as to validate, or remove doubts as to, titles taken under the proceedings—the power of passing the necessary legislation would be; and expresses the view that it would be, obviously, in the Dominion alone. *Cf.*, per Osler, J.A., S. C. 17 O. A. R., at pp. 443-4.

[249] [1894] A. C. at p. 45.

The true constitutional position in this matter would seem to be as follows:—The provincial legislatures have general jurisdiction, and they alone have general jurisdiction, over property and civil rights in the province; but this is not to be understood, on the one hand, as meaning that they can legislate upon any one of the subjects assigned exclusively to the parliament of Canada by section 91; nor is it to be understood, on the other hand, as meaning that the parliament of Canada cannot incidentally affect property and civil rights by its legislation, so far as such power is implied in its power to legislate upon the subjects exclusively assigned to it by section 91, or so far as is required as ancillary to the power to legislate effectually, and completely, on such subjects;[251] and as, on the one hand, the operation of Acts of the provincial legislatures respecting property and civil rights in the province, or other provincial subjects, may be interfered with by reason of the operation of Acts of the Dominion parliament, so, also, Dominion Acts may be interfered with by reason of the operation of Acts of the provincial legislature,[252] although Dominion legislation, whether on one of the enumerated classes in section 91, or by way of provisions properly ancillary to legislation on one of the said enumerated classes, will over-ride and place in abeyance, provincial legislation which directly conflicts with it.[253]

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[250] [1908] A. C. 54, at p. 59. For this case, see further, *supra*, pp. 170; 350.

[251] See *supra*, pp. 170; 350.

Dominion legislation as to property and civil rights under its residuary power.—But it would be impossible for Parliament to legislate even under its general residuary power 'to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by the British North America Act assigned exclusively to the legislatures of the province,' if it was restricted from incidentally affecting property and civil rights in the different provinces, and other matters assigned to the latter.[254] And so in *Russell* v. *The Queen*,[255] the Privy Council held that the Canada Temperance Act, 1878, was within the competency of the Dominion parliament to pass, its primary object and design[256] being to preserve public order and safety, although its provisions might incidentally affect, and interfere with, property and civil rights; for say they,[257] it could not have been intended, while assuring to the provinces exclusive legislative authority on the subject of property and civil rights, to exclude Parliament from the exercise of its general power to make laws for the peace, order, and good government of Canada in relation to matters not coming within the classes of subjects exclusively assigned to the provincial legislatures, whenever any such incidental interference would result from it.

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[252] See *supra*, pp. 164-179; 180-9; 193.

[253] See *supra*, pp. 123-7.

[254] See *supra*, pp. 164-5.

[255] (1882) 7 App. Cas. 829.

[256] See *supra*, pp. 210-213.

Dominion interference must not be more than is necessary to the effectual exercise of its own powers.[258]—But as Ritchie, C.J., observes in *Valin & Langlois,*[259] although the power of the local legislature was, indeed, to be subject to the general and special legislative powers of the Dominion parliament, yet, while the legislative rights of the local legislatures are in this sense subordinate to the right of the Dominion parliament, such latter right must be exercised, " so far as may be, consistently with the right of the local legislatures, and, therefore, the Dominion parliament would only have the right to interfere with property or civil rights in so far as such interference may be necessary for the purpose of legislating, generally and effectually, in relation to matters confided to the parliament of Canada."[260] And so, says Fisher, J., in *Steadman* v. *Robertson*:[261] "In conferring upon the local legislatures the power to legislate upon property and civil rights, I am of the opinion it was the intention that this power should only be trenched upon to the extent required to enable Parliament to exercise the authority to legislate upon the different subjects assigned to it, and the Parliament in legislating upon the subjects within its competency, can only so far interfere with property and civil rights as is necessary to work out the legislation upon the particular subjects delegated to it."[262]

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[257] At p. 839.

[258] See *supra*, pp. 166-179.

[259] (1879) 3 S. C. R. at p. 15. *Cf.* his language in *Citizens Assurance Co.* v. *Parsons* (1880), 4 S. C. R. at p. 242.

The difficulty is, as we have seen, to apply this rule of necessity;[263] but it does not seem possible to concur in the view expressed in some of the earlier judgments, that there is any special sanctity, or significance, in the provincial power over property and civil rights, beyond that of the other provincial powers;[264] although, no doubt, as said by Fournier, J., in *Citizens Insurance Co.* v. *Parsons*,[265] the aim of the law-giver in dividing the legislative powers by sections 91 and 92 of the

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[260] In this sense only, can the words of Burton, J.A., in *Regina* v. *Hodge* (1882), 7 O. A. R. at p. 274, "that the provincial legislatures are absolute and supreme over the subject-matters assigned to them without any possibility of interference by the Dominion legislature," be now accepted.

[261] (1879) 2 P. & B. at pp. 595-6.

[262] So, also, in the United States, the federal power has exercised its jurisdiction over civil rights and property: cf. per Taschereau, J., in *Citizens Insurance Co.* v. *Parsons* (1880), 4 S. C. R. at p. 308.

[263] See *supra*, pp. 166-179.

[264] *E.g.*, per Fisher, J., in *Queen* v. *Mayor, etc., of Fredericton* (1879), 3 P. B. at pp. 169-170.

[265] (1880) 4 S. C. R. at p. 255. *Cf. supra*, pp. 133-6; 184-192.

British North America Act between the Federal Government and the provinces was, so far as compatible with the new order of things, to conserve to the latter their autonomy in so far as the civil rights peculiar to each of them were concerned; and, although, as intimated by the Privy Council, in the same case,[266] the words 'property and civil rights' are to be understood in their largest sense.

Provinces cannot legislate as to property and civil rights necessary to a Dominion object.——Consistently with the above, and as stated by Ramsay, J., in *Dobie* v. *Temporalities Board,*[267] the provincial power, under consideration, over property and civil rights in the province, is not to be understood as applying to such property and civil rights as are necessary to the existence of a Dominion object. He says: "In practice it never has been contended that property means all property. Railroad companies incorporated by Parliament, for instance, hold and manage their property under Dominion laws, and such companies evict people from their private property in the province under Dominion laws. No one will venture to affirm that a local Act could confiscate the property of a railway company incorporated by Parliament, or transfer it to another company or person." And he refers to *Bourgoin* v. *La Compagnie du Chemin de Fer de Montreal;*[268] and adds: "nor by parity of reasoning, could the local legislature confiscate the surplus funds of a bank on the pretext that it was property in the province."[268a] But the measure of the limitation of the power of a provincial legislature over property of a railway or other corporation, incorporated under one of the Dominion enumerated powers, or under Dominion control, must, it is submitted, be found in the application of the principle already laid down,[270] that the British North America Act, by necessary implication, only intended to confer on the Dominion parliament legislative power to interfere with, deal with, and encroach upon, matters otherwise assigned to the provincial legislatures, such as property and civil rights in the province, so far as Dominion Acts relating to any of the classes of subjects enumerated in section 91 may affect them, and to the extent of such ancillary provisions as may be required to prevent the scheme of such a law from being defeated. And the sweeping assertion of Ramsay, J., in *Dobie* v. *the Temporalities Board*,[271] that a provincial Act which disposes of the property of a corporation created by a federal law is necessarily unconstitutional does not seem defensible. What the Privy Council say on appeal in that very case seems to show this. The question was as to the validity of a Quebec Act of 1875, which assumed to alter and amend an Act of the old province of Canada incorporating a Board for the management of the temporalities fund, which had its corporate existence and corporate rights in both of what afterwards became the provinces of Ontario and Quebec. After saying that the Quebec Act of 1875 dealt with the civil rights of a corporation, and of individuals present or future, for whose benefit the corporation was created and existed, their lordships say: "If these rights and interests were capable of division according to their local position in Ontario and Quebec respectively, the legislature of each province would have power to deal with them so far as situate within the limits of its authority."[272]

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[266] (1881) 7 App. Cas. at p. 111.

[267] (1880) 3 L. N. at p. 248.

[268] (1880) 5 App. Cas. 381. See *supra*, p. 356, n.

[268a] *Cf.*, however, *The Alberta and Great Waterways Railway* case, noted *infra*, p. 504.

[270] *Supra*, pp. 164-179.

[271] (1880) 3 L. N. at p. 251.

Power of Dominion parliament over property may depend upon what the property is.— When a question arises as to whether the Dominion parliament has power, in any case, over any property or civil rights in a province, it is necessary to consider what is the particular subject-matter in such case, for the extent of the control of Parliament over the subject-matter may possibly be limited by the nature of the subject.[272a] Thus in *Queen* v. *Robertson*,[273] Gwynne, J., says: "The first item enumerated in the 91st section as placed under the exclusive control of the Parliament is the 'public debt and property,' and by section 108, the provincial public works and property are declared to be the property of Canada. The jurisdiction of Parliament over such property is in virtue of the subject-matter being the property of Canada; but if Parliament should so legislate as to dispose absolutely by sale of portions of this property from time to time, it may well be that the property so sold, when it should become the property of individuals, should be no longer subject to the control of the Dominion parliament any more than any other property of an individual should be." And so in *Attorney-General of British Columbia* v. *Attorney-General of Canada*,[274] when the Privy Council were dealing with the rights of property of the Crown, as represented by the Dominion Government, in what is known as the railway belt in British Columbia, they say: "The object of the Dominion Government was to recoup the cost of the railway by selling the land to settlers. Whenever land is so disposed of, the interest of the Dominion comes to an end. The land then ceases to be public land, and reverts to the same position as if it had been settled by the provincial Government in the ordinary course of its administration." But, as we have seen, the fact that legislative jurisdiction in respect of a particular subject-matter is conferred on the Dominion or provincial legislatures, affords no evidence or presumption that any proprietary rights with respect to it are transferred to the Dominion or provinces, respectively.[275]

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[272] (1882) 7 App. Cas. at p. 152.

[272a] As to the Dominion parliament having control over the disposition of fines, forfeitures, and penalties, imposed under Dominion laws, see report of David Mills, as Minister of Justice, on North-West Territories legislation, of August 12, 1898: Hodgins' Prov. Legisl. 1896-8, pp. 118-9. See, however, *Dumphy* v. *Kehoe* (1891), 21 R. L. 119. *Cf. In re Bateman's Trusts* (1873), L. R. 15 Eq. 355.

[273] (1882) 6 S. C. R. at pp. 65-6.

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[274] (1889) 14 App. Cas. at p. 302. And see *supra*, pp. 414-7.

' Property and civil rights in the province.'[275a] —Having spoken of the limitations and qualifications which the necessity of reading the British North America Act as a whole, imposes upon the construction of the broad words in which this provincial power is expressed, we can now pass on to consider what is the scope which is left to it. In *Citizens Assurance Co.* v. *Parsons,*[276] where it was contended that ' civil rights ' in this clause meant only such rights as flow from the law, as for example, the status of persons, their lordships say that they " find no sufficient reason in the language itself, nor in the other parts of the Act, for giving so narrow an interpretation to the words ' civil rights.' The words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contracts. And they refer to section 94 of the Act, which they term the " uniformity section," whereby the parliament of Canada is empowered to make provision for uniformity of any laws relative to ' property and civil rights ' in Ontario, Nova Scotia, and New Brunswick, and to the procedure of the Courts in those three provinces, if the provincial legislatures choose to adopt the provisions so made, and point out that: " The province of Quebec is omitted from this section for the obvious reason that the law which governs property and civil rights in Quebec is, in the main, French law, as it existed at the time of the cession of Canada, and not the English law which prevails in the other provinces. The words ' property and civil rights ' are obviously used in the same sense in this section as in No. 13 of section 92, and there seems no reason for presuming that contracts and the rights arising from them were not intended to be included in this provision for uniformity." Otherwise, they say, " the Dominion parliament could, under its general power, legislate in regard to contracts in all and each of the provinces, and, as a consequence of this, the province of Quebec, though now governed by its own Civil Code, founded on the French law, as regards contracts and their incidents, would be subject to have its law on that subject altered by the Dominion legislature, and brought into uniformity with the English law prevailing in the other three provinces, notwithstanding that Quebec has been carefully left out of the uniformity section of the Act.[277] The Privy Council then refer to section 8 of the Quebec Act, 14 Geo. III., c. 83, which enacted that Her Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights as they had before done, and that, in all matters of controversy relative to property and civil rights, resort should be had to the laws of Canada, and be determined agreeably to the said laws, and say: " In this statute, the words ' property and civil rights ' are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different and narrower one."[278] But, of course, as we have already seen, an Act may affect the use of property, or civil rights, and yet not be legislation in relation to ' property and civil rights in the province ' within the meaning of No. 13 of section 92, these not being the primary matters dealt with.[279]

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[275] *Supra*, pp. 224-229. In *Sawyer-Massey Co.* v. *Dennis* (1907), 1 Alta. 125, Beck, J., held that the provincial legislature was competent to say that a mortgage, or an agreement to give a mortgage, upon land, prior to recommendation for patent, is void.

[275a] As to 'civil rights in the province' see further *infra* pp. 501-13; as to ' property in the province," see further *infra* pp. 511-3.

[276] (1881) 7 App. Cas. at pp. 109-11. See per Britton, J., in *Bradburn* v. *Edinburgh Assurance Co.* (1903), 5 O. L. R. 657, at pp. 664-6.

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[277] *Cf.* per Caron, J., in *Dobie* v. *Vallée* (1879), 5 O. L. R. at p. 37.

' In the province.'—As the Privy Council judgment in *Dobie* v. *Temporalities Board* suggests,[280] the provincial power over both property and civil rights extends only to such as have a local position within the province. Provincial legislatures have no such power in relation to property or civil rights having their local position in another province; and if, in any case, they cannot legislate in relation to the one, without at the same time legislating in relation to the other, that is a case beyond their powers of legislation altogether. In *Dobie* v. *Temporalities Board,* the validity of a Quebec Act of 1875 was in question, which purported to alter and amend an Act of the old province of Canada, incorporating a Board for the management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland; and in the course of their judgment, their lordships say: " The Quebec Act of 1875 does not, as has already been pointed out, deal directly with property or contracts affecting property, but with the civil rights of a corporation, and of individuals, present or future, for whose benefit the corporation was created, and exists. If these rights and interests were capable of division according to their local position in Ontario and Quebec respectively, the legislature of each province would have power to deal with them so far as situate within the limits of its authority. . . The corporation and the corporate trust, the matter to which its " (*sc.* the Quebec Acts in question) " provisions relate, are in reality not divisible according to the limits of provincial authority. . . The legislation of Quebec must necessarily affect the rights and status of the corporation as previously existing in the province of Ontario, as well as the rights and interests of individual corporators in that province." And so in the Liquor Prohibition Appeal, 1895,[281] the Privy Council say: " A law which prohibits retail transactions and restricts the consumption of liquor within the ambit of the province, and does not affect transactions in liquor between persons in that province and persons in other provinces, or in foreign countries, concerns property in the province which would be the subject-matter of the transactions, if they were not prohibited, and, also, the civil rights of persons in the province;" and they imply that, in their opinion, such a law might well be authorized by No. 13 of section 92, as a law in relation to property and civil rights in the province." But later on, in the same judgment, when alluding to the provision in the Canada Temperance Act, 1886, which permits wholesale dealers in liquors to sell for delivery anywhere beyond the district wherein they carry on business, unless such delivery is to be made in an adjoining district where the Act is in force, they say: "If the adjoining district happened to be in a different province, it appears to their lordships to be doubtful whether, even in the absence of Dominion legislation, a restriction of that kind could be enacted by a provincial legislature." It would seem, especially in the light of the former passage quoted above, that their lordships mean that such a legislative restriction, affecting, as it would do, transactions in liquor between persons in the province and persons in foreign countries, would be legislation in relation to property and civil rights out of the province, as well as in the province, and therefore would not be authorized by No. 13 of section 92.[282]

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[278] In the despatch from the Lieutenant-Governor of Ontario to the Secretary of State, of January 22nd, 1886, on the subject of the power to appoint Queen's Counsel (as to which, see *supra*, pp. 29; 424), section 8 of the Quebec Act is, also, referred to, to show the extensive purport of the words ' property and civil rights,' and it is added:—" Under the same words, in the Upper Canada Act, 33 Geo. III. c. 1, the whole law of England, except the criminal law (which was the subject of another enactment), was held to be introduced:" Ont. Sess. Pap. 1888, No. 37, at p. 17.

[279] See *supra*, pp. 492-3, and as to laws against gambling, *cf*. *Regina* v. *Keefe* (1890), N. W. T. (No. 2) 86; S. C. 1 Terr. L. R. 280; *Regina* v. *Fleming* (1895), 15 C. L. T. 242.

[280] (1882) 7 App. Cas. 136.

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[281] *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada,* [1896] A. C. at p. 364.

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[282] At the same time it seems a little hard to understand why a provincial legislature would not have power to enact with

Now it might appear that the remarks of the Judicial Committee in these two cases as to 'civil rights in the province' only extending to such civil rights "as have a local position in the province," if by that is to be understood 'civil rights based upon obligations completely localised in the province,' are *obiter,* and not necessary to the decision of the matters before the Board. In the *Dobie* case their lordships especially say that the matters to which the provincial Act with which they were dealing related, were "in reality not divisible according to the limits of provincial authority." But in the recent case of *The Royal Bank of Canada* v. *The King,*[282a] popularly known as the Alberta and Great Waterways Railway Company Case, their lordships undoubtedly base their decision upon the above construction of the provincial power over 'civil rights in the province.' In that case it will be remembered parties in London had advanced moneys upon the bonds of the Alberta Railway Company, and these moneys had been paid into the Royal Bank of Canada at its branch in New York, and under instructions of the Head Office of the Bank at Montreal, placed to the credit of the Provincial Treasurer of Alberta in a special account at the Branch of the Bank at Edmonton, all under an agreement or under-

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regard to any property locally situate in the province, that it shall not be taken out of the province. Section 121 of the British North America Act, which provides that 'all articles of the growth, produce, and manufacture of any one of the provinces shall, from and after the Union be admitted free into each of the other provinces,' is obviously, as it would seem, *alio intuitu,* and aimed against inter-provincial tariffs.

[282a] [1913] A. C. 283.

standing with the Government of the province, and the railway company, that these monies should be paid out upon the construction of the railway, as the work progressed. The provincial Government guaranteed the bonds. Then when the construction of the railway had been barely commenced, the provincial legislature, under circumstances not necessary to mention here, in 1910, passed an Act confiscating the money to the general revenue purposes of the province, while reaffirming the guarantee, and providing for the indemnification of the railway company as to all claims which might be brought against it. Their lordships say, referring to this Act:—"It purports to appropriate to the province the balance standing at the special account in the Bank, and so to change its position under the scheme to carry out which the bondholders had subscribed their money. . . It appears to their lordships that the special account was opened solely for the purposes of the scheme, and that when the action of the Government in 1910 altered its conditions, the lenders in London were entitled to claim from the Bank at its head office in Montreal the money which they had advanced solely for a purpose which had ceased to exist. Their right was a civil right outside the province, and the legislature of the province could not legislate validly in derogation of that right. In the opinion of their lordships, the effect of the statute of 1910 if validly enacted, would have been to preclude the Bank from fulfilling its legal obligation to return their money to the bondholders whose right to this return was a civil right which had arisen and remained enforceable outside the province. The statute was on this ground beyond the powers of the legislature of Alberta, inasmuch as what was sought to be enacted was neither confined to property and civil rights within the province, nor directed solely to matters of merely local or private nature within it."

It might have been thought, disregarding as *obiter* the *dicta* in the Dobie case above referred to, that No. 13 of section 92 has the effect of giving provincial legislatures complete control of what rights can be enforced by way of action, or by way of defence, in the provincial Courts, just as No. 14 gives them complete control over the administration of justice in the province. But their lordships now distinctly hold in this Alberta case, that this is not so in the case of a right which has arisen and is enforceable outside the province. Provincial legislatures cannot direct their own Courts to refuse to recognise such a right in an action brought in them. The decision is obviously a most important one. Their lordships, in fact, gave effect to the contention of Sir Robert Finlay, who was of counsel in the case:[282b] "My submission to your lordships is that where the property to be dealt with is a debt, when the civil rights to be affected are the civil rights in respect of a debt, in order that the legislature may have jurisdiction to deal with that debt, it is necessary that both debtor and creditor, and all parties concerned, should be within the local limits. . So long as any other persons have rights in this debt, if these other persons are outside the province of Alberta, it is enough, I submit, to exclude the jurisdiction of the Alberta legislature." And they refused to give effect to the contention of Mr. Buckmaster, (3rd day, p. 21):—" If the law which you must invoke is the law of a particular province, or State, the civil right which you assert is a right within that State. It is not a civil right which you possess by virtue of being a citizen somewhere else. It is a civil right which you possess by virtue of having obtained the benefit of the administration of laws within that particular area;" which seems to come very near what the writer would have liked to have seen submitted to the Board, namely, that a civil right in a province, or anywhere, is nothing else than a right to invoke the assistance of the civil Courts of that province, or other place, to give effect to some claim of a party to litigation, whether by way of action, or by way of defence to an action: that so far as anyone has such a right, he has 'a civil right' in that province, or other place, whether he has or has not a similar right, under the same set of facts, elsewhere or not: and over such a civil right in a Canadian province, the provincial legislature has plenary power, saving always the powers of Parliament.[282d]

[282b] *Verbatim* report of argument from notes of Marten, Meredith and Co., of 8 New Court, London. 2nd day, p. 34.

There were made in the course of this argument certain remarks by members of the Board which are, of course, of interest.[282e] Thus (2nd day, p. 34): Lord Moulton. "I am puzzled how an Alberta Act can be relevant in an action against people outside Alberta, unless it is with regard to entirely local property, such as land, or something of that kind."

[282d] See, also, an Article on this case by Mr. J. S. Ewart, K.C., in 33 C. L. T. 269 *et seq.*, where he defends the Alberta Act as *intra vires* under No. 10 of sec. 92, as relating to a 'local Work and Undertaking.' See, also, 9 Dom. L. R. at pp. 346-363.

(2nd day, p. 61): Lord Atkinson. "If a man owns some land they might pass an Act that, unless he developed it in some way within the course of five years, it would be forfeited."

Lord Haldane, L.C. "I think it must be so because the preamble of the British North America Act recites that the 'provinces of Canada, Nova Scotia, and New Brunswick, have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland with a Constitution similar in principle to that of the United Kingdom,'—that is to say the principle of a Sovereign parliament which may confiscate or do anything it pleases. . We know no restriction under our Constitution of Sovereign powers. These are transferred to Canada, subject only to this that they are the creation of an Imperial statute."

[282e] The suggestiveness and value of the remarks by members of the Board quoted in this work, and in The Law of Legislative Power in Canada, from *verbatim* reports of arguments before the Privy Council, seem to the writer beyond all question. But at the same time, it does not follow that it is proper to cite them in Court, especially before the Judicial Committee. In the Lord's Day Act Case, [1903] A. C. 524, Mr. O'Meara, of counsel for one of the parties, attempted this, but Lord Davey said:—"They ought not really even to be cited:" Marten, Meredith, Henderson and White's Shorthand Report, 2nd day, p. 59. However on the argument in *Cunningham* v. *Tomey Homma*, [1903] A. C. 151, Mr. C. Robinson, of counsel for the appellant, is reported as quoting words of Lord Watson, spoken on the argument in *Fielding* v. *Thomas*, [1896] A. C. 610, without any objection being raised: *Verbatim* report of Barrett and Barrett, p. 10.

(3rd day, p. 18): Lord Moulton. "'Civil rights in the province' does not mean civil rights according to the law of the province. Suppose two people from Alberta are in London, and they make a contract, and they say 'this is to be interpreted according to the law of Alberta,' does that make it civil rights within the province of Alberta?"

(3rd day, p. 43): Lord Haldane, L.C. "Supposing the legislature has passed legislation which has given civil rights to persons outside the province. Can the legislature repeal the legislation which has had that effect? Because, although speaking for myself, I quite agree that we are dealing with sovereign powers, they are sovereign powers which are distributed, and it may be that the Dominion has got that power to the exclusion of the province."

(3rd day, p. 52): Lord Haldane, L.C. "You may authorise the legislature to create civil rights outside the province, and those civil rights may be validly created, regard being had to the power subsisting at the time. It is quite another thing to say that you can take those away merely because you can repeal the Act."

Mobilia personam sequuntur.—In some of the earlier Ontario decisions, it seems to have been supposed that this maxim, or the same maxim in its quainter form, *mobilia ossibus inhaerent,* may in some way apply to restrict the scope of the provincial power over 'property and civil rights in the province'; so that provincial legislatures may not have jurisdiction over personal or movable property, or over civil rights, though situate within the province, if the owner of them be domiciled in another province, or abroad.[283] But, as we have seen, these maxims cannot, in any way, either restrict or enlarge the provincial legislative power under No. 2 of section 92, of 'direct taxation within the province,'[284] so neither can they, in any way, affect the scope of provincial power over 'property and civil rights in the province,' which can, it is submitted (subject to restriction in the import of those terms rendered necessary to allow scope for the other provisions of the British North America Act),[285] have "no practical limit except the lack of executive power to enforce their enactments," to adopt the words of the Judicial Committee in *Dobie* v. *Temporalities Board.*[286] In other words, if 'property and civil rights' have such a local position in the province, that the legislative arm can reach them, the provincial legislature has, subject as aforesaid, jurisdiction over them, no matter where the domicil of the owner of them may be. The application of the maxims referred to, is, as Mr. Dicey explains in his Conflict of Laws,[287] to be found in the fact that debts or choses in action are generally, and other personal property sometimes, to be looked upon as situated in the country where they are properly recoverable or can be enforced.[288]

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[283] So per Strong, V.-C., in the *Goodhue Case* (1873), 19 Gr. at p. 452. And in *Jones* v. *Canada Central R. W. Co.* (1881), 46 U. C. R. 250, Osler, J., certainly seems to countenance the idea that the domicil of the owner of a debenture might determine whether the provincial legislature had jurisdiction in relation to it under No. 13 of section 92.

[284] See *supra*, pp. 403-7, and Legislative Power in Canada, pp. 757-759.

[285] See *supra*, pp. 488-492.

[286] (1882) 7 App. Cas. at p. 146. See *supra*, pp. 64-85.

Owner in one province: property in another.—Assuming, then, that the maxim *mobilia personam sequuntur* has no application to this matter of legislative power, it is submitted further that if a person domiciled in Ontario owns property in Quebec, his right to that property is also a ' civil right ' in Quebec, within the meaning of the clause we are considering. But it must be admitted that if this be so, certain words of the Privy Council in *Dobie* v. *Temporalities Board*,[289] are puzzling, where their lordships say: " When funds belonging to a corporation in Ontario are situated or invested in the province of Quebec, the legislature of Quebec may impose direct taxes upon them for provincial purposes, as authorized by sub-section 2 of section 92, or may impose conditions upon the transfer or realization of such funds; but that the Ontario legislature shall have power, also, to confiscate these funds, or any part of them, for provincial purposes, is a proposition for which no warrant is to be found in the Act of 1867." For we have seen that the power of provincial legislatures over property and civil rights in the province is plenary; and they can confiscate property and vested rights, in the exercise of that power, if they see fit so to do.[290] And, therefore, it is submitted that their lordships' words must be read as having reference only to such legislation as was then before the Board, where the Quebec legislature had assumed to confiscate—or rather divert—the funds in Quebec of a corporation incorporated by an Act of the old province of Canada, and essential to the purposes of the incorporation. The writer submits that, so far as constitutional power goes, a provincial legislature could under No. 13 of section 92, confiscate any property, whether of a corporation or an individual, situate within the limits of the province,[290a] excepting, indeed, the public property of the Dominion which, by No. 1 of section 91, is placed under the exclusive jurisdiction of the Dominion parliament, or property which belongs to a Dominion corporation, with, of course, a Dominion object, and the control of which is essential to prevent such Dominion object being defeated, for example the track of a Dominion railway.[291] The property of a corporation might be confiscated without necessarily affecting its constitution or status as a corporation.[292]

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[287] 2nd ed., pp. 309-310.

[288] As to the *situs* of debts and choses in action, and the distinction between whether a debt is one by contract or by specialty: see per Duff, J., in *Lovitt* v. *The King* (1910), 43 S. C. R. at p. 131; and as to the *situs* of the obligation of a bank under a deposit receipt issued by one of its branches: see S. C. in appeal, [1912] A. C. 212; and per Duff, J., 43 S. C. R. at pp. 133-142. See, also, *Henty* v. *The Queen*, [1896] A. C. 567; per Burton, J.A., in *Nickle* v. *Douglas* (1875), 37 U. C. R. at pp. 61-62; per Patterson, J.A., S. C. at p. 71; Per Wilson, J., S. C. at p. 145. The Minister of Justice objected, as might be expected, to a provincial Act authorizing the sale by the Attorney-General, as administrator, of real estate situate outside the province of intestates dying without known relations in the province: Hodgins' Provincial Legislation, 1867-1895, pp. 151, 156-7.

[289] (1882) 7 App. Cas. at p. 151. See, also, *Royal Bank of Canada* v. *The King*, [1913] A. C. 283; *supra*, pp. 504-7.

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[290] *Supra*, pp. 82-5.

[290a] See *supra*, pp. 83-4.

[291] As to which, see *supra*, pp. 495-7.

'Property in the province.'—In *In re Windsor and Annapolis R. W. Co.*,[293] the majority of the Court held that the property and civil rights of a railway, which, though authorized to extend beyond the province, and connect with lands without the province, yet had, as a matter of fact, not done so, but operated wholly within the province, were within the jurisdiction of the provincial legislature, no declaration having been made, under No. 10 of section 92 of the British North America Act, that the railway was a work for the general advantage of Canada, and this though all, or nearly all, the shareholders and creditors were outside the province.

Affecting rights of extra-provincial creditors.—And as to provincial legislation, under No. 13 of section 92, affecting the rights of extra-provincial creditors, reference may be made to the words of Osler, J., in *Clarkson* v. *Ontario Bank,*[294] in regard to the Ontario Act respecting assignments for the benefit of creditors, of which he says: " It directly affects the rights of all their creditors whether in this, or the other provinces, or elsewhere. So far, therefore, as it controls the rights of extra-provincial creditors, it is not confined to dealing with property and civil rights in the province, although that, as held in *Jones* v. *Canada Central R. W. Co.,*[295] may not be an objection in the case of creditors under an Act of a purely private or local character." But, it is submitted, the Act referred to only controls the rights of extra-provincial creditors so far as such creditors seek payment of their debts against the property of an insolvent person within the province; and it seems quite consistent with principle that so far as outside creditors seek their remedy within the province, they are subject to the law of the province.[296] The Privy Council, on appeal,[297] in dealing with the only provision of the Act which was before them, namely, that whereby executions not completely satisfied by payment were postponed to an assignment for the general benefit of creditors, do not expressly discuss the point that the effect of it extends to extra-provincial creditors; but say (at p. 198): " Now there can be no doubt that the effect to be given to judgments and executions, and the manner and extent to which they may be made available for the recovery of debts, are *prima facie* within the legislative powers of the provincial parliament. Executions are a part of the machinery by which debts are recovered, and are subject to regulation by that parliament."

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[292] *Cf. Cowan* v. *Wright* (1876), 23 Gr. 416, where, however, the properties in question, as the report shews, belonged to particular congregations in Ontario, not to Church bodies existing in the various provinces as a corporate whole, so that the case is not any authority on the subject of legislative power over property in one province of corporations belonging to another province.

[293] (1883) 4 R. & G. at pp. 322-3. The company was incorporated by Act of the Nova Scotia legislature shortly before the coming into force of the British North America Act.

[294] (1888) 15 O. A. R. at p. 190.

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[295] (1881) 46 U. C. R. 250. As to this case, see, also, *supra*, pp. 454-5.

[296] See *supra*, pp. 504-7, and *The Royal Bank of Canada* v. *The King*, [1913] A. C. 283, as there cited.

[297] [1894] A. C. 189.

It remains to notice other examples of statutes and matters which have been held to be, or not to be, within this provincial power over 'property and civil rights' in the province.

Statutes and matters which have been held to be within No. 13 of section 92.—In the Liquor Prohibition Appeal, 1895,[298] we have seen that the Privy Council said that a law which prohibits retail transactions, and restricts the consumption of liquor within the ambit of the province, and does not affect transactions in liquor between persons in the province and persons in other provinces, or in foreign countries, concerns property in the province which would be the subject-matter of the transactions if they were not prohibited, and, also, the civil rights of persons in the province; and may, perhaps, be authorized under No. 13 of section 92, as legislation in relation to property and civil rights in the province; but they do not consider it necessary to determine whether such legislation is authorized under that head or not, because, if not, it would fall, *prima facie*,[299] within No. 16 of section 92, as a matter of a merely local or private nature.

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[298] *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A. C. 348.

[299] By '*primâ facie*' here their lordships seem to mean that the vice of intemperance might prevail so universally throughout the Dominion that the restriction or prohibition of the sale of liquor therein, was more than a matter of merely local or private nature or interest in particular localities, and had become a matter to be dealt with in a Canadian aspect for the peace, order and good government of Canada generally, by the Dominion par-

In *Citizens Insurance Co.* v. *Parsons,*[300] the Privy Council held that a provincial Insurance Act intended to regulate the business of fire insurance companies in the province, with a view to securing uniform conditions in their policies, fell within No. 13 of section 92, and not within No. 2 of section 91, ' the regulation of trade and commerce.'

In *Gower* v. *Joyner,*[301] the Supreme Court of the North-West Territories decided that an ordinance enacting that for ill-usage, non-payment of wages, or improper dismissal of a servant by his master, a justice of the peace might order such master to pay the servant one month's wages in addition to arrears and costs, and in default, imprisonment for a month, was *intra vires* of the Legislative Assembly under No. 13 and No. 14 (the administration of justice), Rouleau, J., dissenting.

In *Florence Mining Co.* v. *Cobalt Lake Mining Co.,*[302] the Ontario Court of Appeal says: " The right to bring an action is a civil right." And so, in No. 13 and No. 14, of section 92, has been found the power of provincial legislatures to authorize the initiation of legal proceedings against defendants out of the jurisdiction.[303]

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liament; and on this latter theory they upheld the Canada Temperance Act, 1878, in *Russell* v. *The Queen* (1882), 7 App. Cas. 829. As to No. 16 of section 92, see *supra*, pp. 140-3, and *infra*, pp. 627-9.

[300] (1881) 7 App. Cas. 96.

[301] (1896) 2 Terr. L. R. 387.

[302] (1909) 18 O. L. R. 275. In App. to the Privy Council, 102 L. T. 375.

[303] *Stairs* v. *Allan* (1896), 28 N. S. 410, at pp. 418-9; *McCarthy* v. *Brener* (1896), 2 Terr. L. R. 230. See also, *supra*, pp. 104-5, n.

In *Ex parte Ellis,*[304] a provincial Act providing for the imprisonment of a person making default in payment of a sum due on a judgment, in case (amongst other things) the liability was incurred by obtaining credit under false pretences, or by means of any other fraud, or by the commission of an act for which he might be proceeded against criminally, was held valid, because rightly viewed it was an Act for enforcing the payment of judgments; and in the words of Allen, C.J.: " Surely the enforcing the payment of a judgment is a civil right, and the mode of enforcing it a part of the administration of justice and procedure in civil matters in the province, all of which are expressly within the jurisdiction of the provincial legislature."[305]

In *Regina* v. *Wason,*[306] an Ontario Act to provide against frauds in the supplying of milk to cheese and butter manufactories, was held valid as relating to property and civil rights. Maclennan, J.A., says[307] in this case: "What was here enacted, although it may in its widest sense be regarded as a criminal law, falls under section 92 as a legitimate dealing with property and civil rights in the province." Osler, J.A., observes:[308] "The legislature, when really dealing with property and civil rights, must have power to say 'thou shalt' or 'thou shalt not;' and as the breach of the legislative command is always, in one sense, an offence, the line between what may and what may not be lawfully prescribed without trenching upon criminal law is sometimes difficult to ascertain and different according to circumstances."[309]

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[304] (1878) 1 P. & B. 593.

[305] In connection with this case may be mentioned *Re Stinson and College of Physicians* (1911), 22 O. L. R. 627, where Riddell, J., held that the provisions of Ontario statutes conferring power on the Council of the College of Physicians and Surgeons of Ontario to erase from their register the name of a practitioner for misconduct amounting to an indictable offence, although he may not have been convicted of the offence, is not *ultra vires*, because an enquiry under it—" is not a criminal trial involving punishment for the crime alleged;—it is merely the determination of facts upon which the civil rights of the accused may depend, just as an enquiry under R. S. O., 1897, c. 172, s. 44, by the Benchers of the Law Society . . It is not a matter of criminal law but of civil rights": (p. 634). It will be seen that many provincial Acts may be rested indifferently on No. 13 of section 92, as relating to property and civil rights in the province, or on No. 14 (the administration of justice in the province), or on No. 16 (matters of a merely local or private nature in the province), and cases may be found noticed under those two subsections, which might also have been noticed here; and *vice versa*. *Infra*, pp. 525-573; 627-9.

[306] (1889-1890) 17 O. R. 58, 17 O. A. R. 221.

Provinces in legislating under No. 13 of section 92 may in some incidental way regulate trade and commerce.[310]—In *Regina* v. *Taylor*,[311] Wilson, J., says of an Ontario Act concerning bills of lading, and giving consignees and endorsees the same rights, and imposing on them the same liabilities as if the contract had been made with them: "I think that the same Act which the Ontario Legislature passed as a general provision affecting property and civil rights over which it has exclusive jurisdiction, the Dominion parliament might, also, have passed as a necessary and convenient matter to be dealt with in the regulation of trade and commerce. . . And the Ontario Act, just as it is, not professing to regulate trade, and not doing so, but in an incidental manner only, is not, in my opinion, *ultra vires* so far as the statute itself can be, as I think in such a case it can be, supported as dealing only with property and civil rights."

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[307] 17 O. A. R. at p. 251.

[308] *Ibid.*, at pp. 240-1.

[309] As to this case of *Regina* v. *Wason*, see further *infra*, pp. 590-2.

[310] As to the construction of the Dominion power over the regulation of trade and commerce under No. 2 of section 91, see *supra*, pp. 230-6.

[311] (1875) 36 U. C. R. at p. 206.

Provinces in legislating under No. 13 of section 92 may in some incidental way touch the subject of bankruptcy and insolvency.[311a] *In re Killam,*[312] Savary, Co.J., referring to a Nova Scotia Act for the relief of insolvent debtors, which provided for discharge from prison of a debtor on assignment of his property in trust to pay his debts, says: " So long as the party seeking the benefit of that chapter has not become insolvent under the Dominion statute, all the proceedings under it are valid and effectual, for they only relate to property and civil rights; but as soon as the Dominion statute of insolvency is invoked, that chapter has no more force as to him, or his case, and the relief it contemplates can only be obtained under the Dominion statute. He is then in bankruptcy or insolvency within the meaning of the British North America Act, and the Insolvent Act of Canada, therefore, attaches, with exclusive authority upon his person and property."[313] And in *Parent* v. *Trudel,*[314] Andrews, J., says: "Though a general bankruptcy and insolvency Act, such as that, for instance, recently in force here, under the title of the Insolvency Act of 1875, is admittedly a matter to be dealt with by the Federal parliament, it seems to me that a law defining the conditions under which a writ of capias can be obtained (even though it apply in some of its enactments merely to insolvent traders) is within the power of our local legislature to deal with."

[311a] As to the Dominion power over bankruptcy and insolvency, see *supra*, pp. 279-293.

[312] (1878) 14 C. L. J. N. S. at pp. 242-3.

But in his report of Nov. 11th, 1899, the Minister of Justice objected to a Quebec Act providing with reference to railway companies subsidized by the province, that in certain cases it should be lawful for the Lieutenant-Governor in Council to authorize the Commissioner of Public Works to cause the railway and roadbed and all the rolling stock and equipment thereof to be sequestrated or sold. He says: "One of the events upon which these proceedings may be had is the insolvency of the company. The statute proceeds to enact the procedure consequent upon such order. . . It is, in the opinion of the undersigned, clearly incompetent to a provincial legislature to provide for the sequestration or the sale of a company's property, or the winding-up of the affairs of the company, by reason of the company's insolvency." He did not however proceed to recommend disallowance.[315]

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[313] There has been no Dominion legislation in relation to bankruptcy or insolvency, save as to corporations, since 1880, when all existing insolvency Acts were repealed by 43 Vict. c. 1, D.

[314] (1887) 13 O. L. R. at p. 139.

[315] Provincial Legislation, 1899-1900, at p. 49.

Right of voting not a 'civil' right within the meaning of No. 13 of section 92.[316] *In re North Perth, Hessin* v. *Lloyd,*[316a] Boyd, C., takes occasion to observe that the right of voting for a member of parliament is not an ordinary civil right. It is, he says, historically and truly a statutory privilege of a political nature, and the right of voting for the Dominion House of Commons "falls within the category, not of civil rights in the province, but of electoral rights in Canada."

Section 94 of the British North America Act.—It remains, before closing the subject of property and civil rights, to mention this section under which the Dominion parliament may make provision 'for the uniformity of all or any of the laws relative to property and civil rights' in Ontario, Nova Scotia, and New Brunswick, 'and of the procedure of all or any of the Courts in those three provinces; and from and after the passing of any Act in that behalf the power of the parliament of Canada to make such laws in relation to any matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the parliament of Canada making provision for such uniformity shall not have any effect in any province unless and until it is adopted and enacted as law by the legislature thereof.' On March 12, 1902, Dr. Benjamin Russell moved a resolution in the Dominion House of Commons favouring steps being taken to carry out the provisions of this section for securing the uniformity of the laws relating to property and civil rights in all the provinces of Canada except Quebec.[316a] He urged that there were other subjects on which it was as important that there should be uniform legislation throughout the Dominion as in the case of bills of exchange and promissory notes, such as the sale of goods, the formation, operation and discharge of contracts, joint stock companies, and the devolution of real and personal property. The seconder of the resolutions, however, expressed doubt whether there was anything in the terms under which the provinces of Manitoba, Prince Edward Island, and British Columbia entered Confederation which gave the Federal parliament power to enact such legislation in regard to them. Another member (Mr. John Haggart), stated (as the mover also had done) that it was the general hope and expectation of the men who drew up the British North America Act and were the founders of Confederation "that as soon as our first Parliament met, a step would have been taken in this direction, but instead we have followed the policy of drift until we have reached the present stage when that confusion exists among the various laws which the honourable member has so well described." Mr. R. L. Borden expressed the view that—"It would be idle for this Parliament to undertake a work of this kind until the provinces had got together and ascertained whether there was any basis upon which they could agree on any subject coming within the definition of property and civil rights. . . We have had various opinions and speculations in the Privy Council and the Supreme Court as to whether this or that subject came within the description of property and civil rights, or of some other subject as to which the provincial legislatures have jurisdiction under the British North America Act."

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[316] See the remarks of the Privy Council in reference to this section, in *Citizens' Insurance Co.* v. *Parsons*, quoted, *supra*, pp. 499-501.

[316a] (1891) 21 C. R. 538.

[316a] Debates of House of Commons, Vol. 56, p. 1069, *et seq.* The motion was debated at considerable length though no vote was taken.

Reference may also be made to an Address on Uniformity of Laws in Canada delivered by Mr. Eugene Lafleur, K.C., before the Canadian Club at Ottawa, on December 7th, 1912. The learned writer discusses how far uniformity is desirable, and how, if desirable, it is attainable. He mentions as departments of law in which uniformity is eminently desirable, the law of commercial sales, succession duty, insurance and the licensing of insurance companies, and the incorporations of companies, and as to these last says (p. 7) : " I have yet to hear any sound reason for the existence in the Dominion of ten different systems for incorporating and licensing insurance companies and joint-stock companies (nine provincial and one federal), ten different kinds of insurance law, and ten different kinds of company law. The only objection which I have heard on the part of the provinces is that a concentration of all these powers in the Dominion would deprive them of the revenue which they derive from incorporating, licensing, or registering such companies. But assuredly this is a matter of detail which could be adjusted equitably by attributing to the several provinces the fees exigible from such corporations, according to the situation of the head office of each corporation, or in some other appropriate manner. It is unnecessary to dwell on the enormous advantages of such a fusion. Every corporation could exercise its powers throughout the Dominion, and in foreign countries, as far as the comity of nations permits, without fear of exceeding its own charter powers. A fire insurance company in Ottawa would no longer be perplexed as to whether it can insure property in Quebec or in the State of Maine, and a commercial corporation in Montreal would not be in doubt as to how far it can operate in British Columbia or in California. The system of incorporating local companies ' with provincial objects ' was devised before the existence of our great transcontinental railways, and before the enormous expansion of corporate undertakings. It serves no useful purposes to restrict commercial corporations by geographical bounds. . . Even if we cannot make up our minds to have all insurance companies and commercial corporations chartered by the Dominion (which, in my humble opinion, would be the best way of solving doubts as to the extent of their powers), what is to prevent us from having identical legislation in all the provinces on insurance law and on company law?"

As to methods of attaining the desired uniformity, Mr. Lafleur suggests proceeding by the voluntary and concerted action of the provinces themselves, and asks—" What possible objection can there be to our meeting together, examining our points of difference, ascertaining which of these might be advantageously removed, and passing concurrent and identical legislation on any given subject in our respective legislatures? The experiment has been successfully tried in the United States by the appointment of State Boards for promoting uniformity of legislation.'"[316b]

14. The administration of justice in the province, including the constitution, maintenance, and organization of provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts.[317]— In a remarkable report of the late Sir John Thompson, as Minister of Justice, supporting the disallowance of a certain Quebec Act, 51-52 Vict. c. 20, amending the law respecting District Magistrates, which report was affirmed by the Governor-General in Council on January 22nd,

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[316b] Reference may also be made to A Plea for a Uniform Contract of Fire Insurance in Canada in (1899) 19 C. L. T. 112; and Articles on Uniformity of Provincial Laws by R. B. Henderson, in 19 C. L. T. 209; and on Uniform Legislation by W. Seton Gordon in 20 C. L. T. 187. See, also, 46 C. L. J. 41.

[317] 'The constitution of provincial Courts of criminal jurisdiction,' as distinguished from 'procedure in criminal matters,' which by No. 27 of section 91 of the British North America Act is for the Dominion parliament exclusively, has been discussed, *supra*, pp. 333-7. And as to the power to appoint Queen's Counsel, see *supra*, pp. 29; 424. As to the power of the Dominion parliament to create new Courts to exercise jurisdiction in federal matters, and to deprive the provincial Courts of such jurisdiction, see *supra*, pp. 293-4; *infra*, pp. 553-5, and section 101 of the Federation Act, *infra*, pp. 672-688. As to how far 'maintenance' in this subsection implies power of taxation, see *supra*, pp. 411-414. As to predominance of Dominion parliament over provincial penal laws, see *infra*, pp. 623-7. And as to provincial Courts, see the words of Ritchie, C.J., in *Valin* v. *Langlois* (1879), 3 S. C. R. at pp. 20-2, and *supra*, pp. 148-153; *infra*, pp. 541-7.

1889,[318] Sir John Thompson says that "the most remarkable instance in which provincial legislation has overrun the limits of provincial competence, has been the legislation in reference to the administration of justice." He is referring, especially, to provincial legislatures interfering with, or trespassing upon, the power given to the Governor-General in the matter of the appointment of judges by section 96 of the British North America Act. This section enacts as follows:

96. The Governor-General shall appoint the Judges of the Superior, District and County Courts in each province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Before, then, considering what the provinces may do in the matter of the appointment of judicial officers, or otherwise, under No. 14 of section 92, it may be well to consider what, under the Dominion authorities, they may not do by reason of this section 96, and the general interpretation of this latter section.[319]

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[318] Hodgins' Provincial Legislation, 1867-1895, p. 358. This report is also set out at length in Legislative Power in Canada, at pp. 140-174.

[319] The arrangement by which the Governor-General was to appoint the Superior, District, and County Court judges, while the provinces were to constitute the Courts, and in civil matters, settle the procedure, was regarded by some with much dismal foreboding. See the speech of Mr. Dunkin in the debates on the Quebec resolutions in the parliament of Canada: Debates on Confederation, 1865, pp. 508-9. In his law of the Canadian Constitution (2nd ed., pp. 301-2), Mr. Clement discusses whether the power to appoint County and District Court judges, in section 96, carries with it the power to remove, section 99 of the Act apply-

Dominion power over the appointment of judges.—In his report just referred to Sir John Thompson says that the view has been taken by nearly all the Ministers of Justice, since the union of the provinces, that the words of the British North America Act referring to 'Judges of the Superior, District, and County Courts' include all classes of judges like those designated, and not merely the judges of the particular Courts which at the time of the passage of that Act happened to bear those names.[319a] In *Ganong* v. *Bayley,*[320] though with no reference especially to the point thus referred to by Sir John Thompson, the Court agreed in interpreting section 96 by a reference to Courts existing before Confederation. Thus Weldon, J., says:[321] "At the time of the passing of the Confederation Act, there were Superior Courts in all the provinces which were embraced in the Confederacy. There were District Courts in Canada. In Lower Canada there were the districts of Gaspe, of Saguenay, and of Chicoutimi; there were the County Courts existing in Upper Canada, and

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ing only to Superior Court judges: (see Appendix of Statutes, *infra*), and comes to the conclusion that it does, referring to the *Re Squier* (1882), 46 U. C. R. 474. On the same point the *Niagara Election Case* (1878), 29 C. P. at p. 280, may be cited. See, also, an article on the Constitution of Canada, 11 C. L. T. 145, *seq.;* and Todd's Parl. Gov. in Brit. Col., 2nd ed., at pp. 46-7, 827, *seq.*, who treats, also, of the powers of removal still existing under Imp. 22 Geo. III. c. 75; and an Article on the right to remove County Court judges, 17 C. L. J. 445. R. S. C. 1906, c. 138, provides for the removal of County Court judges by order of the Governor-General in Council in certain cases.

[319a] And see *In re Small Debts Act*, and *Bank* v. *Tunstall*, *infra*, pp. 528-9.

[320] (1877) 1 P. & B. 324.

[321] At p. 326.

(*sic*) subsequently were established in New Brunswick, Nova Scotia, and Prince Edward Island. It appears to me these were the Courts that the Governor-General was to appoint the judges to, when established, or as vacancies may occur, and to provide for them salaries, allowances, and pensions. There were, also, at the time of the passing of the Confederation Act, Commissioners' Courts for the summary trial of small causes in what is now the province of Quebec, and there were Division Courts in Ontario. No reference is made to them in the said Act. The several Acts establishing these small Courts in the several provinces, prior to Confederation, also provided for the appointment of officers thereof by the several local executives, and were not referred to, or expressly provided for, in the said Act."

Provincial attempts to invade this Dominion power in respect to the appointment of judges.—As Drake, J., says in *In re Small Debts Act*:[322] "The province could not, by abolishing the existing Courts, and establishing others under a different nomenclature with equal jurisdiction, escape from the supreme power vested in the Governor-General of appointing the judges." Thus in *Bank* v. *Tunstall*,[323] the same learned judge held that, though the provincial legislature could create Mining Courts, it could not give Gold Commissioners, appointed to preside over them, jurisdiction "unlimited as to amount, and limited only by the fact that the question to be decided must be between persons engaged in mining." This, he said, was to trench upon the powers of the Governor-General under section 96. Otherwise "the provincial legislature would only have to constitute a Court by a special name, to enable them to avoid this clause; but in the section itself, after the special Courts therein named, the Courts of Probate in Nova Scotia and New Brunswick are excepted from the operation of the clause, thus showing that section 96 was intended to be general in its application."[324] By report of Dec. 30th, 1901, the Minister of Justice objected to a New Brunswick Act purporting to amend the Act respecting the Court of Divorce and Matrimonial Causes by providing that if a newly-appointed judge of the Court was disqualified to hear a case, for any reason, any other judge of the Supreme Court named by the judge so interested to act as judge of the Court of Divorce and Matrimonial Causes for the completion of such suit or matter, might proceed therewith as if he had been the duly appointed judge of the said Court, saying that it plainly transgressed the exclusive authority of the Governor-General to appoint the judges of provincial Courts, and was *ultra vires,* and should be disallowed. The provincial authorities, however, repeated the objectionable provision.[325]

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[322] (1896) 5 B. C. 246, at pp. 264.

[323] (1890) 2 B. C. (Hunter) 12.

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[324] Upon the general subjects of provincial attempts to evade section 96 in respect to the appointment of judges, see the report of Sir John Thompson upon the Quebec District Magistrates Act, 1888, above referred to, p. 525. In the course of that report he says that "the promoters of this kind of legislation have been disposed to assume that the organization of a tribunal with small civil and criminal jurisdiction, presided over by a judge or magistrate, appointed by the provincial Executive, would be within provincial authority, and that such a tribunal, having been established, its authority and jurisdiction could be widened and increased under the powers which the provincial legislatures possess to regulate the administration of justice in the province, etc." And he refers to the fact that, on a report of the Minister of Justice of May 8th, 1883, a British Columbia Act conferring jurisdiction on Gold Commissioners appointed by the Lieutenant-Governor of British Columbia was disallowed.

Provincial attempts to settle the qualifications of judges to be appointed by the Governor-General under section 96.—In his report in the Quebec District Magistrates Act,[326] 1888, Sir John Thompson says: " It has been common for the provinces to enact from time to time what the qualifications of the judges who were to be appointed by the Governor-General should be, although this seems to the undersigned to be an attempt to control, by provincial legislation, the power vested in the Governor-General by the British North America Act. The most plausible argument offered in defence of such legislation has been the contention set up in one quarter that, inasmuch as it is for the provincial legislatures to say whether the Court shall be constituted or not, it is proper for them to say that the Court shall be constituted provided judges of certain qualifications are appointed to preside therein. This seems to the undersigned to be erroneous in principle. It is an attempt to provide that the power of the Governor-General shall be exercised only *sub modo,* and if the principle were recognized, it would be competent to provide that provincial Courts should only be established, provided the judges were those nominated by the provincial Executive, or taken from a class nominated by that Executive." He also refers to the report of the then Minister of Justice of November 18th, 1874, to the effect that the provisions of the Ontario Act with respect to the qualifications to be possessed by certain judges, were *ultra vires,* as placing a limit on the discretion of the Governor-General not to be found in the British North America Act, and declaring that such provision was ineffectual, and that the Governor-General would not be bound by it. So, again, by report of October 29th, 1904, the Minister of Justice took exception to a British Columbia Act of that year, providing that the persons to be appointed judges of the Supreme Court of British Columbia should be barristers-at-law of not less than ten years standing, of which ten years they should have been for five years actively engaged in practice at the Bar of British Columbia; and he refers to a previous report of the Minister of Justice in 1896, on a similar enactment of the Province of Nova Scotia.[327] The provincial authorities of British Columbia, however, avoided disallowance by repealing the objectionable section.[328] And when, in the following session, the British Columbia legislature re-enacted the provision, the Act was at once disallowed.[329]

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[325] Provincial Legislation, 1901-3, p. 33. See *King* v. *King* (1904), 37 N. S. 294, *infra,* p. 537, n.

[326] See *supra,* p. 526, n.; Hodgins' Provincial Legislation, 1867-1895, at p. 358.

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[327] Provincial Legislation, 1896-8, pp. 12-14.

[328] *Ibid.*, 1904-6, pp. 128, 135.

[329] *Ibid.*, pp. 155, 157.

Provincial attempts to provide for removal in certain events of Dominion judges.—In his report, so often referred to already,[330] on the Quebec District Magistrates Act, 1888, Sir John Thompson says:[331] "A statute of Ontario, assented to January 23rd, 1869, chap. 22, made provision that the judges of the County Courts of Ontario should hold their office during pleasure, and should be subject to be removed by the Lieutenant-Governor for inability, incapacity, or misbehaviour, and was specially reported on by the Hon. Sir John Macdonald, then Minister of Justice, and, being referred, at his suggestion, to the law officers of the Crown in England, the latter on May 4th, 1869, reported that it was not competent for the legislature of the province of Ontario to pass the Act.[332] The report was signed by Sir Robert Collier and the present Lord Chief Justice of England. It would seem that the legislature of Ontario had acted in pursuance of the theory that its power to make laws in relation to the administration of justice in the province, 'including the constitution, maintenance, and organization of provincial Courts,' involved the power to limit the tenure of office, and to constitute the Court with a proviso, in effect, that the appointing power of the Governor-General should be exercised *sub modo*. The Minister of Justice of that day, and the law officers of the Crown in England, maintained that that could not be done."

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[330] *Supra*, p. 525.

[331] Hodgins' Prov. Legisl., 1867-1895, at p. 361.

[332] See *ibid.*, p. 84.

He also refers[333] to a report of his own of April 13th, 1887, wherein he stated that a provision of a Manitoba statute, to the effect that for certain misconduct the County Court Judge should forfeit his office, was *ultra vires* of the provincial legislature.

Provinces supplementing salaries of Dominion judges.—On January 19th, 1870, Sir John Macdonald reported in favour of the disallowance of the Supply Bill of the province of Ontario, because it supplemented the salaries of certain of the judges of that province, and the Act was disallowed accordingly.[334] And on June 14th, 1879, Chief Justice McDonald, then Minister of Justice, took exception to an Act of Prince Edward Island which allowed a small fee for costs taxed by the County Court judge, as being a breach of the provisions of the British North America Act in relation to the emoluments of judges.[335] However, in 1910, the Ontario Extra-Judicial Services Act, 10 Edw. VII., c. 29, was allowed to go into force, which provides that every judge of the Supreme Court shall be paid out of the Consolidated Revenue Fund, the annual sum of $1,000, as compensation for the services which he is called on to render by any provincial legislation in addition to his ordinary duties.

Provincial regulation of County Court judges. — On March 9th, 1875, the Minister of Justice recommended the disallowance of a British Columbia statute, because, after the appointment of County Court judges in particular districts, it empowered the Lieutenant-Governor to appoint the places at which the County Court judges should reside from time to time, the Minister declaring that this was practically assuming the power of the appointment of judges, and the Act was disallowed accordingly.[336] On Oct. 13th, 1875, the Hon. Edward Blake, then Minister of Justice, reported against a similar statute of the same province.[337] He said that the " consequence of permitting the Act now under consideration to go into operation would be to permit the Lieutenant-Governor in Council to arrange the boundaries of those districts, and to alter them at his pleasure, and so, practically, to determine, at his pleasure, the places within which the County Court judges should have jurisdiction." He contended that such an enactment was objectionable, " as the alterations thereby authorized might practically result in the appointment, by the local government, of a County Court judge to a new district, or judgeship, thus transferring to the local Government a part of the power of appointment vested in this Government under the constitution;" and, he added, " so long as the local legislature keeps within its own hands the division of the districts, and the alteration of their boundaries, this Government has, by virtue of the power of disallowance, some measure of control over such action; but should this Act go into operation, no such control could thereafter be exercised here.''

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[333] Hodgins' Prov. Legisl., 1867-1895, at pp. 853-4.

[334] *Ibid.*, at pp. 93-4.

[335] *Ibid.*, at pp. 1202-3.

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[336] Hodgins' Prov. Legisl., 1867-1895, at pp. 1032-1034.

[337] *Ibid.*, at pp. 1037-1038.

However, in *In re County Courts of British Columbia*,[338] the Supreme Court of Canada decided that the legislature of British Columbia had power, under No. 14 of section 92 of the British North America Act, to enact, as they had done, that a County Court judge appointed for one district might, under certain circumstances in the Act mentioned, act as judge in another district, and, also, that until a County Court judge of Kootenay had been appointed the judge of the County Court of Yale should act as such, and have, while so acting, whether sitting in the County Court district of Kootenay, or not, 'all the powers and authorities that the judge of the County Court of Kootenay, if appointed and acting in the said district, would have possessed in respect to such actions, suits, matters, and proceedings,' and that the two County Court districts should, for the purpose of this enactment, but not further or otherwise, be united. Strong, J., delivering the judgment of the Court, there lays it down that the powers of the federal Government respecting provincial Courts are limited to the appointment and payment of the judges of those Courts, and to the regulation of their procedure in criminal matters; and says:[338a] "the jurisdiction of Parliament to legislate, as regards the jurisdiction of criminal courts, is, I think, excluded by subsection 14 of section 92, before referred to, inasmuch as the constitution, maintenance, and organization of provincial Courts plainly includes the power to define the jurisdiction of such Courts, territorially, as well as in other respects. This seems to me too plain to require demonstration. Then if the jurisdiction of the Courts is to be defined by the provincial legislatures, that must necessarily also involve the jurisdiction of the judges who constitute such Courts.''[338b]

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[338] (1892) 21 S. C. R. 446; Brit. Col. Sess. Pap., 1893, pp. 298-293. This decision overruled *Peil-ke-ark-an* v. *Reginam* (1891), 2 B. C. (Hunter) 52; also *Gibson* v. *McDonald* (1885), 7 O. R. 401.

[338a] 21 S. C. R. at p. 453.

So in *In re Wilson* v. *McGuire*,[339] the Ontario Court of Queen's Bench held valid an Ontario statute which provided that two or more counties might be grouped together by the Lieutenant-Governor for judicial purposes therein specified, and conferred on the County Court judges of grouped counties the same authority to try suits in each of the grouped counties as they possessed in their own counties respectively. There had been prior to Confederation, and since, in each county in Ontario, Division Courts for the trial of small causes, and these had always been presided over by County Court judges, who since Confederation are appointed by the Governor-General under section 96 of the British North America Act; and on the authority of the above Ontario Act, the County judge of the County of Lambton had assumed to exercise jurisdiction in the Division Court of the County of Middlesex. The Court held that the provincial legislature having complete jurisdiction over the Division Courts could appoint the officers to preside over them, and that the Ontario enactment was valid, Hagarty, C.J.O., observing: "I do not feel that, in the case before me, any difficulty is created by the fact of the judge of Lambton being an officer appointed by the Dominion expressly for that county.'"[340]

[338b] See *The King* v. *Wipper* (1901), 34 N. S. 202, at p. 212; and *Ex parte Vancini* (1904), 36 N. B. 456, especially at pp. 462-3. So in *Crowe* v. *McCurdy* (1885), 18 N. S. 301, the Supreme Court of Nova Scotia had decided that the jurisdiction of County Court judges does not depend upon their commissions, which are only descriptive of the tribunal over which such judges are appointed to preside, but upon enactments of the provincial legislature which may define, enlarge, and extend the districts within which the judges sit, as it sees fit. *In re County Courts of British Columbia* was followed in *The King* v. *Brown* (1907), 41 N. S. 393. *Cf. Ex parte Wright* (1896), 34 N. B. 127, at pp. 130-1, where the question is raised but not decided, whether sec. 540 of the Criminal Code, 1892 (now R. S. C. 1906, c. 146, s. 583), which purported to take away from the County Courts of New Brunswick the jurisdiction they had previously possessed to try certain criminal offences is, or is not, *ultra vires* the N. Bruns. Court, evidently inclining to think it was; rightly, as *In re County Courts of British Columbia*, *supra*, seems to show. *Sed quære*. See *infra*, pp. 553-5.

[339] (1883) 2 O. R. 118.

Provinces designating County Court judges to try cases of corrupt practices under local option clauses of provincial liquor Acts.—So in *Rex* v. *Carlisle*,[341] the Ontario Court of Appeal has held, with reference to sec. 91 (4) of the Ontario Liquor Act, 1902, which enacts that the President of the High Court shall designate a County or District judge to conduct the trial of persons accused of corrupt practices at the taking of the vote under the local option clauses—that the provincial legislature did not assume the power of appointing judges, and did not exceed its powers, in providing that a County or District judge designated should exercise jurisdiction outside his own County or District. Moss, C.J.O., says (p. 724): " There is no appointment of any person to the judicial office. There is not even the creation of a judicial office to which any person not holding the position of a judge of a County or District Court could be appointed. The legislature having the power to make laws, regarding the administration of justice in the province, including the constitution, maintenance, and organization of provincial Courts, both of civil and provincial jurisdiction, has deemed it proper to create a special tribunal for the trial of offences under the Liquor Act. The judges exercise jurisdiction under this statutory commission, acting just as the Election judges act, outside of and distinct from the jurisdiction they exercise in their respective Courts. And the legislature did not exceed its powers when by section 91, it provided for the substitution of County or District judges to conduct the trial of offenders under the Act, and enabled them to exercise jurisdiction outside their county or district."

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[340] See 3 C. L. T. at pp. 20, 81, 145, where referring to County Court judges acting as judges of the Division Courts, it is said (p. 20):—'These judges act under a statutory commission, just as the Superior Court judges act, in election cases, under the statutory commission of the Controverted Election Act,' referring to *Valin* v. *Langlois* (1879), 5 App. Cas. 115, 3 S. C. R. 1. In *King* v. *King* (1904), 37 N. S. 294, 212, it was held that a provincial Act altering the quorum of the Court of Appeal in divorce and matrimonial causes, making it unnecessary for the Judge Ordinary to sit as a member of the Appeal Court, was *intra vires*.

[341] (1903) 6 O. L. R. 718. See also, *Rex* v. *Walsh* (1903), 5 O. L. R. 527.

Provincial legislatures appointing County Court judges as local judges and referees. — In a report of Jan. 30th, 1882, Sir Alexander Campbell, then Minister of Justice, says:[342] "The undersigned thinks it doubtful whether the provincial legislature can constitutionally in this manner appoint judges, who hold office by commission from your Excellency, to other offices under the provincial Government. The expediency of allowing County judges to act as referees and local masters is questionable, and the same may, at some future time, require the consideration of Parliament." So too, in a report, as Minister of Justice, of November 2nd, 1895,[343] referring to section 185 of the Ontario Judicature Act, 1895, Sir C. H. Tupper says: "The practice has hitherto been, where a provincial legislature has constituted the office of local judge of a Superior Court, and declared that the County Court judges shall exercise the jurisdiction conferred upon such local judges, for your Excellency to issue commissions to such County Court judges, appointing them to the office which under the provincial statute they are qualified to fill. The section in question appears to be merely a re-enactment of a previous one, and if the practice formerly existing be continued, there could be no doubt as to the authority of judges so appointed to exercise the jurisdiction which is intended to be conferred."[344]

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[342] Hodgins' Prov. Legislation, 1867-1895, at p. 186.

[343] *Ibid.*, at p. 244*b*.

[344] See *supra*, pp. 528-9. And see report of Sir Oliver Mowat as Minister of Justice of August 24th, 1897, as to a certain Nova Scotia Act: Hodgins' Prov. Legisl., 1896-8, pp. 35-6.

Provincial legislatures may regulate the procedure in civil matters, and the sittings of the judges of the Supreme Court of the province.—In the *Thrasher Case,*[345] the British Columbia judges held that section 28 of the British Columbia Local Administration of Justice Act, 1881, by which it was provided that the judges of the Supreme Court of the province should sit as a full Court only once a year, at such time as might be by rules of Court appointed, was *ultra vires* on the ground[346] that the Court was not a provincial Court within the meaning of No. 14 of section 92, and that it is over the procedure of such provincial Courts alone that No. 14 gives the provincial legislature jurisdiction. The Supreme Court of Canada, however, upon the question being referred to it by the Governor-General in Council, held that the legislature of British Columbia could make rules to govern the procedure of the Supreme Court of the province in all civil matters, and could delegate this power to the Governor-General in Council; and that the provincial Act in question was *intra vires.* Their lordships unfortunately did not give their reasons for this decision.[347]

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[345] (1882) 1 B. C. (Irving) 170. See this case referred to in Todd's Parl. Gov. in Brit. Col., 2nd ed., at p. 566 *seq.;* also a number of letters and Articles upon it, in Vol. 18 of the Canada Law Journal, especially two by Mr. Todd, at pp. 181, 265; and a series of Articles on provincial jurisdiction over civil procedure: 2 C. L. T. at pp. 313, 360, 409, 456, 513, 561.

[346] At p. 174.

[347] 54-55 Vict. c. 25, s. 4, D. (R. S. C. 1906, c. 139, s. 60), now expressly requires the judges of the Supreme Court to certify their reasons upon such references; and has been held to be *intra vires* of the Dominion parliament: *Attorney-General for Ontario* v. *Attorney-General for Canada,* [1912] A. C. 571, 43

Dominion can impose jurisdiction on provincial Courts over Dominion subjects.[348]—Analogously to many other provincial powers, the exclusive power of provincial legislatures to make laws in relation to the administration of justice and the constitution of Courts in the provinces has to be understood in such a way as to leave room for the exercise of certain Dominion powers. The words of Strong, J., indeed, in *In re County Courts of British Columbia,*[349] above quoted,[350] would seem to deny to the Dominion parliament any power whatever to legislate as regards the jurisdiction of provincial Courts, or of the judges constituting such Courts; while on the other hand, in *Attorney-General of British Columbia* v. *City of Victoria,*[351] Begbie, C.J., says: "There is no doubt but the Dominion legislature can alter, abridge,

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S. C. R. 536. It was unsuccessfully contended that for the Dominion parliament to authorize such references in respect to provincial legislation, was in conflict with No. 14 of section 92.

[348] There is a point of distinction here between our Constitution and that of the United States, where Congress cannot vest jurisdiction in State Courts, nor the State legislatures give jurisdiction to the Federal Courts. Wilson, J., in the *Niagara Election* case (1878), 29 C. P. at pp. 293-4, and Meredith, J., in *Valin* v. *Langlois* (1899), 5 Q. L. R. at p. 11, took the view that our Constitution was analogous to the American in this respect, and that the Federal parliament could not exercise any rights whatever over provincial Courts. But see per Fournier, J., in *Valin* v. *Langlois*, 3 S. C. R. at p. 55. In *Belanger* v. *Caron* (1879) 5 Q. L. R. at pp. 31-2, Stuart J., says: "If the Dominion parliament can create a new jurisdiction in a provincial Court, what will prevent a provincial legislature from imposing a jurisdiction on a Dominion Court? The prohibition to make certain laws attaching to all these legislatures springs from the same source, is couched in the same language, and is mutual and reciprocal."

[349] (1892) 21 S. C. R. at p. 453.

[350] *Supra*, pp. 535-6.

[351] (1890) 2 B. C. (Hunter) at p. 2.

and enlarge the jurisdiction of this Court as it has done on several occasions:" a somewhat surprising dictum in view of the fact that he is referring not to jurisdiction to administer Dominion laws, but to an enactment of the Dominion parliament that where the question of the validity of a provincial Act was raised on the pleadings in an action it should be reserved for the sole decision of the Supreme Court of Canada.[352] The decision of the Privy Council in *Valin* v. *Langlois*,[353] places beyond doubt the power of the Dominion parliament to impose, as in the Dominion Controverted Elections Act, 1874, new duties upon existing provincial Courts, and to give them new powers as to matters which do not come within the classes of subjects assigned exclusively to the legislatures of the provinces.[354]

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[352] This Dominion enactment is now to be found in R. S. C. (1906) c. 139, s. 67. It is expressly conditioned by the clause 'when the legislature of any province of Canada has passed an Act agreeing,' etc.; but Begbie, C.J., seems to consider that Parliament had authority so to enact, without any concurrent provincial legislation, which it is humbly submitted it would not have. However, the point does not seem to have been raised by the parties to the case before him. See *infra*, pp. 553-5.

[353] (1879) 5 App. Cas. 115. For previous provincial decisions, see Legislative Power in Canada, p. 349, n. 1.

[354] At the same time their lordships say, referring to the language of the Dominion Act in question, which conferred upon provincial Courts jurisdiction with respect to controverted elections to the Dominion House of Commons:—"Words could not be more plain than those to create this as a new Court of record, and not the old Court with some superadded jurisdiction:" 5 App. Cas. at p. 121. As to the Dominion power under discussion, and for instances of its existence, see per Ritchie, C.J., S. C. 3 S. C. R. at pp. 20-22. See, also, per Henry, J., S. C. at p. 69; and per Johnson, J., in *Ryan* v. *Devlin* (1875), 20 L. C. J. at pp. 83-4. In *Piel Ke-ark-an* v. *Reginam* (1891), 2 B. C. (Hunter) at p. 76, Drake, J., observes that, although the Dominion legislature has power to impose on the judges additional duties, "these addi-

And in *Bruneau* v. *Massue,*[355] Dorion, C.J., says: "The judges of the Superior Court as citizens are bound to perform all the duties which are imposed upon them by either the Dominion or the local legislature. If these duties were either incompatible or too onerous to be properly performed, provided neither legislature had exceeded the limits of its legislative power, it would become the duty of the local and Dominion Governments to suggest a remedy by some practical solution of the difficulty, but it does not devolve upon the Courts of justice to assume the authority of declaring unconstitutional a law on account of the real or supposed inconveniences which may result in carrying out its provisions." [356] This passage is cited with approval in *In re References by the Governor-General in Canada;*[357] but Idington, J., in that case, asks:[358] "Can Parliament constitute this Court a tariff commission, a civil service commission, a conservation commission, a department for the management of any affairs of State, or adjunct to any of the Departments discharging such duties, or an advisory adjunct to the provincial

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tional duties must be performed within the limits of the judicial districts to which the judges are appointed; any other contention would interfere with the power of appointment of the judges vested in the Governor-General by section 96 of the British North America Act, but it is submitted that the Dominion parliament, by an Act assented to by the Governor-General, could certainly exercise any powers vested in the latter. See *supra*, pp. 23-4.

[355] (1878) 23 L. C. J. at p. 60. See some remarks in 11 L. N. at pp. 349-50, on the question of the expediency of vesting Dominion or federal judicial powers in provincial Courts.

[356] See *supra*, pp. 82-5; 192-3.

[357] (1910) 43 S. C. R. at p. 551.

[358] At p. 581.

Courts?" He adds, however: "I do not deny for one moment the competence of Parliament to constitute a Board for any one of these suggested purposes, or to annex thereto an advisory committee for purposes of inquiry into, and answering questions of law. But, I do say that no such, or the like duties, can be imposed on this Court," referring to section 101 of the British North America Act. That section will be found discussed hereafter,[359] but it is submitted, with great deference, that there is nothing in it to restrain the Dominion parliament imposing additional duties upon the Supreme Court of Canada, established under that section; and that the reasoning of the judgment of the Privy Council on appeal in the case last referred to,[360] is quite decisive that the Dominion parliament would have power to enact in the various ways suggested by Idington, J., if in its wisdom it saw fit so to do.

And so, in *Ex parte Vancini*,[361] it was held that, although the organization of Courts of criminal jurisdiction is within the exclusive powers of the provincial legislatures, the Dominion parliament may impose upon existing Courts, or magistrates, the duty of administering the criminal law, and its action to that end need not be supplemented by provincial legislation.[362] The enactment here in question was section 785 of the Criminal Code (now section 777 of R. S. C. 1906, c. 146), giving police magistrates power to try, by consent, offences triable in Ontario before the general sessions of the peace. Sedgewick, J., delivering the judgment of the Court, cites with approval the words laid down in proposition 45 of ' Legislative Power in Canada:' " The Dominion parliament can, in matters within its sphere, impose duties upon any subjects of the Dominion, whether they be officials of provincial Courts,[363] other officials, or private citizens;" and adds: " When once the parliament of Canada has given jurisdiction to a provincial Court, whether superior or inferior, or to a judicial officer, to perform judicial functions in the adjudicating of matters over which the parliament of Canada has exclusive jurisdiction, no provincial legislation, in our opinion, is necessary in order to enable effect to be given to such parliamentary enactments."[364] And in *Attorney-General of Canada* v. *Sun Chak*,[365] it was held that Parliament can confer upon a provincial Court, in that case a stipendiary magistrate having jurisdiction in respect to matters of debt not exceeding $80, jurisdiction in respect to amounts above that sum; and, also, that Parliament, having conferred jurisdiction upon a provincial Court, must be understood to have adopted its procedure, unless the subject be one on which it can enact procedure,[367] and does enact it." [368]

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[359] See *infra*, pp. 672-688.

[360] *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1912] A. C. 571.

[361] (1904) 36 N. B. 456, esp. at pp. 462-3, in App. 34 S. C. R. 621.

[362] Followed *Geller* v. *Loughrin* (1911), 24 O. L. R. 18, at pp. 25, 33.

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[363] *Op. cit.* p. 510. As to what are 'provincial Courts,' see letter of Mr. Alpheus Todd, in 18 C. L. J. at p. 181.

[364] As Ritchie, C.J., says, in *Valin* v. *Langlois*, 3 S. C. R. at pp. 20-2, the provincial Courts "are the (King's) Courts bound to take cognizance of and execute all laws whether enacted by the Dominion parliament or the local legislatures, provided always such laws are within the scope of their respective legislative powers."

[365] (1909), 44 N. S. 19.

In *Ex parte Porter*,[369] it was held that the Dominion parliament can empower magistrates, appointed by the provincial Government, to hear informations under the Dominion Summary Convictions Act for violations of Dominion statutes. Allen, C.J., however (at pp. 592-3), with whom Wetmore and King, JJ., concurred, seems to indicate the view that though the Dominion parliament had the right to make use of provincial magistrates for the purpose of enforcing the law where the provincial legislature, as in the case before him, had not authorized the constitution of any Court to try such offences, yet that if the provincial legislature had established such a Court, the Dominion parliament would have had either to make use of that Court, or establish a Dominion Court under section 101 of the British North America Act,[370] but could not select some other provincial Court in lieu of the one so established by the provincial legislature.[371]

Lastly, in *Ex parte Perkins*,[372] it was held that section 103 of the Canada Temperance Act, which purported to give Parish Court Commissioners in New Brunswick (officials appointed under an Act of the provincial legislature with civil jurisdiction), power to adjudicate in prosecutions for violations of that Act, was *intra vires.*[373]

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[367] As to which, see *infra*, pp. 549-553.

[368] See, also, *The King* v. *Wipper* (1901), 34 N. S. 202, which follows *Valin* v. *Langlois* (1879), 5 App. Cas. 115, and *Attorney-General of Canada* v. *Flint* (1884), 16 S. C. R. App. at p. 707. As to the latter case, see *infra*, pp. 547-9.

[369] (1889) 28 N. B. 587.

[370] See Appendix of Statutes, and *infra*, pp. 672-688.

[371] See *infra*, pp. 553-5.

[372] (1884) 24 N. B. at p. 70.

The Dominion Parliament can confer jurisdiction on a British Vice-Admiralty Court sitting in Canada.—In *Attorney-General of Canada* v. *Flint,*[374] the Supreme Court of Canada held that section 156 of the Inland Revenue Act, 31 Vict. c. 8, D., which enacts that all penalties and forfeitures incurred under that Act, or any other law relating to excise, may be prosecuted, sued for, and recovered in the Court of Vice-Admiralty having jurisdiction in that province of Canada where the cause of prosecution arises, was *intra vires* of the Dominion parliament, on the principles laid down in *Valin* v. *Langlois,*[375] and that the fact that the Vice-Admiralty Court at Halifax was an Imperial Court, established under Imperial authority, made no difference, although Strong and Henry, JJ., express the view that the Court of Vice-Admiralty might, if it saw fit, decline the jurisdiction conferred upon it by the legislature of the Dominion. The Court appealed from, the Supreme Court of Nova Scotia,[376] had held the other way, on the ground that the Imperial legislature "never contemplated, in clothing Parliament with power to make laws for the government of Canada, that it should pass an Act conferring a new jurisdiction upon the British Vice-Admiralty Court, and require that Court without further Imperial legislation, to adjudicate upon such a matter as this collection of a penalty." Weatherbe, J., delivering the judgment of the Court, observes (p. 460): "I suppose if the province were to assign the recovery of a penalty for breach of one of its own laws on a subject within its exclusive power to the Vice-Admiralty Court, that would be the same question that is now before us."[377] It also appears from this judgment that the judge of the Vice-Admiralty Court at Halifax, Sir W. Young (who held that he had jurisdiction, and appears, indeed, to have thought that the Imperial Act governing the practice and proceedings of his Court itself required him to adjudicate on breaches of all revenue laws in force in the Dominion), in giving judgment said: "Much was said at the argument of the power of the Dominion legislature over this as an Imperial Court, and, no doubt, if a Dominion Act were to attempt to give this Court a jurisdiction analogous to that of Admiralty Courts in the United States, and exceeding that of the High Court of Admiralty in England I would have no difficulty in holding that such an Act was *ultra vires;* but it is very certain that no such Act will ever pass." But Weatherbe,

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[373] The other judgments above cited show that this decision was correct, overruling the subsequent decision the other way of *Ex parte Flanagan* (1899), 34 N. B. 577.

[374] (1884) 16 S. C. R. App. 707. Followed in *The King* v. *Kennedy* (1902), 35 N. S. 266. *Cf. The Farewell* (1881), 7 Q. L. R. 380.

[375] (1879) 5 App. Cas. 115.

[376] (1882) 3 R. & G. 453.

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[377] As to the plenary powers of provincial legislatures, see *supra*, pp. 64-67; 184-192.

J., says as to this,[378] that his Court considered that this admission, if good law, was fatal to allowing the jurisdiction of the Vice-Admiralty Court in the case before them, which must be allowed if at all, " not on account of any power it derived by virtue of its being an Imperial Court, and thereby having jurisdiction over the general subject of inland revenue," but, " on the broad ground that the parliament of the Dominion is not to be limited in organizing adopting, or selecting its tribunal, or procedure, for the trial of any matter over which it has exclusive right to legislate; that its power is not even to be confined to creating new Courts, or clothing established provincial tribunals with any authority it sees fit, but that it may require any Imperial Court, having jurisdiction of any kind in this country—and even in one province of the Dominion—to exercise jurisdiction of another kind altogether, and adopt a new procedure, and hear evidence which in no other case would be heard, and even to impose a duty on the war and naval authorities on this station, requiring, for instance, the Courts—Courts martial—which have been erected by the Imperial power for particular purposes, to try offences against regulations of the Service—to try questions of Canadian militia, revenue, or shipping."[379]

Dominion interference with civil procedure of provincial Courts in Dominion matters.—In

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[378] 3 R. & G. at p. 461.

[379] We have already had occasion to see that the *reductio ad absurdum* is not a reliable line of argument in dealing with the determination of legislative power. See *supra*, pp. 543-4.

Cushing v. *Dupuy,*[380] it was "very faintly urged," to use the expression in the judgment that the provisions of the Insolvency Act, 1875, as amended by 40 Vict. c. 41 D., interfered with property and civil rights, and was *ultra vires;* and it was "strongly contended" that the parliament of Canada could not take away the right to appeal to the Queen from final judgments of the Court of Queen's Bench, as it was alleged to have done by 40 Vict. c. 41, s. 28, because this, it was said, was part of the procedure in civil matters exclusively assigned to the legislature of the province. Their lordships say (at p. 415): "The answer to these objections is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property and other civil rights, nor without providing some mode of special procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is, therefore, to be presumed, indeed, it is a necessary implication, that the Imperial statute, in assigning to the Dominion parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the provinces, so far as a general law relating to these subjects might affect them."[381]

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[380] (1880) 5 App. Cas. 409. Overruling *Fraser Institute* v. *More* (1875), 19 L. C. J. 133.

[381] For other judicial *dicta* in harmony with the above words of the Privy Council, see Legislative Power in Canada, p. 427,

And so in *Peek* v. *Shields*,[382] Ritchie, C.J., reiterating his language in *Valin* v. *Langlois*,[383] said: " The right to direct the procedure in civil matters in the provincial Courts has reference to the procedure in matters over which the provincial legislature has power to give them jurisdiction, and does not in any way interfere with, or restrict, the right or power of the Dominion parliament to direct the mode of procedure to be adopted in cases in which the Dominion parliament has jurisdiction, and where it has exclusive authority to deal with the subject-matter as it has with the subject of bankruptcy and insolvency."[384]

Ward v. *Reed*,[385] is an instructive case in connection with the matter under discussion. There a provincial Act enacted that the County Courts should not have jurisdiction over any action against a justice of the peace for anything done by him in the execution of his office. A Dominion Act, however, which was held to be *intra vires,* provided that penalties against justices of the peace for non-return of convictions might be recovered in an action of debt by any person suing for the same in any Court of Record, and the Court held that such action could be properly

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n. 1. See, also, *Re Steinberger* (1906), 5 W. L. R. 93, where it was held that the order of the Governor-General in Council, passed under the authority of the Dominion Lands Act, specifying the mode of procedure to be followed in the enforcement of miners' liens on Dominion lands in Yukon Territory was *intra vires*.

[382] (1880-3) 31 C. P. 112, 6 O. A. R. 639, 8 S. C. R. 579.

[383] (1879) 3 S. C. R. at p. 15.

[384] This language is cited with approval by Burton, J.A., S. C. 6 O. A. R. at p. 561. See, also, per Henry, J., in *Valin* v. *Langlois* (1879), 3 S. C. R. at p. 64.

[385] (1882) 22 N. B. 279.

brought in a County Court of the province, and that the provisions of the local statute were overridden by the Dominion enactment.

It comes, then, to this, that though the provinces alone have general jurisdiction over the administration of justice in the province by virtue of No. 14 of section 92, the Dominion parliament may deal with the matter, so far as is necessary to the complete and effectual exercise of one of its own enumerated powers; but, of course, in the absence of such Dominion legislation the power to legislate remains in the province. And so the administration of justice in the province is only, strictly speaking, exclusively within the provincial jurisdiction in respect to matters assigned to the legislatures by section 92. As Crease, J., says in the *Thrasher Case*:[386] "In the great majority of Dominion Acts there are provisions, not only vesting jurisdiction in the Courts of the province, but, also, regulating, in many instances and particulars, the procedure in such matters in those Courts, *e.g.,* customs, inland revenue, public works, banks and banking, trade marks, fisheries, public lands, inspection of staples, aliens and naturalization, patents, insolvency, and a host of others."

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[386] (1882), 1 B. C. (Irving), at p. 208. As to provincial Courts created by local legislatures not having jurisdiction to interfere with the decisions of a Dominion tribunal, such as the Minister of Agriculture in the case of patents, see *In re The Bell Telephone Co.* (1885), 9 O. R. 339, at p. 346. As to the Courts not enforcing an *ultra vires* order of such a tribunal, see *Re Canadian Pacific R. W. Co. and County and Township of York* (1896) 27 O. R. at p. 570. In *Richer* v. *Gervais* (1894), R. J. Q. 6 S. C. 254, it was held that a Dominion Act declaring a non-juridical day must be interpreted as relating only to Dominion matters.

But the Dominion parliament, of course, cannot prescribe procedure in provincial matters; and so in *McKilligan* v. *Machar,*[387] Killam, J., held that certain provisions of the Dominion Lands Act, 1883, which provided that 'copies of any records, documents, plans, books, or papers belonging to, or deposited in, the Dominion Lands office, attested under the signature of the Minister of the Interior, etc., shall be competent evidence in all cases in which the original records, documents, books, plans, or papers would be evidence,' were *ultra vires* so far as they could be considered to apply to suits merely for the cancellation as clouds upon titles of conveyances (not being letters patent from the Crown) registered under the Manitoba Lands Registration Act. And in *Weiser* v. *Heintzman* (*No. 2*),[388] where the Dominion parliament, having enacted that no person shall be excused from answering any question on the ground that the answer may tend to criminate him, Boyd, C., held that this "by necessary constitutional limitations, as well as by express declaration, applies only to proceedings respecting which the parliament of Canada has jurisdiction."[389]

Quære whether Parliament can take away jurisdiction from the provincial Courts, even in Dominion matters.—It does not follow that because the Dominion parliament can impose jurisdiction on provincial Courts in Dominion matters, therefore it can divest the provincial Courts of such jurisdiction, although, of course, it can establish additional Courts of its own for the better administration of the laws of Canada, under section 101 of the British North America Act,[390], and then, perhaps, it can give such Dominion Courts sole jurisdiction on Dominion subjects. Under No. 14 of section 92 the provincial legislatures have the exclusive power to constitute, maintain, and organize provincial Courts, both of civil and criminal jurisdiction, for the administration of justice in the province; and it does not seem that the Dominion can take that jurisdiction away. Thus we have seen that in *Ex parte Porter,*[391] the judges intimate that if the provincial legislature has established a Court for enforcing the criminal law, the Dominion parliament will have either to make use of that Court, or establish a Dominion Court under section 101. And Wilson, J., speaks in a similar way in *Crombie* v. *Jackson*,[392] in reference to such matters as proceedings upon bills of exchange and promissory notes. And in *Ex parte Wright*,[393] the Court (p. 131) evidently inclined to the view that section 540 of the Criminal Code, 1892, which purported to take away from the County Courts of New Brunswick the jurisdiction they had previously possessed to try certain criminal offences was *ultra vires* as relating to criminal jurisdiction.

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[387] (1886) 3 M. R. 418.

[388] (1893) 15 O. P. R. 407. *Cf. Regina* v. *Bittle* (1892), 21 O. R. 605; *Regina* v. *Fox* (1899), 18 O. P. R. 343.

[389] *Regina* v. *Roddy* (1877), 41 U. C. R. 291, must, it would seem, be considered no longer law. And see *infra*, pp. 618-622.

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[390] See Appendix to Statutes; and *infra*, pp. 672-688. See also, *supra*, pp. 541-7. In *Re North Perth, Hessin* v. *Lloyd* (1891), 21 O. R. 538, it was held by the Ontario Chancery Divisional Court, over-ruling *Re Simmons and Dalton* (1886), 12 O. R. 505, that, whereas in the Electoral Franchise Act, the Dominion parliament had committed the whole matter of the registration of parliamentary voters (one essentially within its own power and control) to a body of public functionaries called revising officers, appointed by the Governor-in-Council, while there was nothing in the Act to give any indication of an intention that provincial Courts were to have any jurisdiction, power, or control over any of the proceedings under the Act, or the revising officer, there was no jurisdiction in the High Court of Justice to control by prohibition the revising officer. And so *McLeod* v. *Noble* (1897), 28 O. R. 528, 24 O. A. R. 459.

[391] (1889) 28 N. B. 587, *supra*, p. 331.

Provincial judicial officers—Division Court judges. — In *In re Wilson* v. *McGuire*,[394] the majority of the Ontario Court of Queen's Bench held that provincial legislatures have complete jurisdiction over Division Courts, and may appoint the officers to preside over them, Hagarty, C.J., observing: "As they (*i.e.* the local legislatures) have power to abolish such Courts, and to establish others for the disposal of the like or other classes of business, I assume their right to appoint officers to preside over them." Armour, J., dissented, and, evidently, did not consider that No. 14 of section 92 of the British North America Act, whereby provincial legislatures can make laws in relation to the constitution, maintenance, and organization of provincial Courts, etc.,[395] carries with it the power to appoint any judges at all; but, as we shall presently see, his judgment in the later case of *Regina* v. *Bush*,[396] seems to shew a change of view.

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[392] (1874) 34 U. C. R. at pp. 579-580. *Cf.* per Thompson, J., in *Pineo* v. *Gavaza* (1885), 6 R. & G. at p. 489. See this case commented on in 22 C. L. J. N. S. at pp. 70-72.

[393] (1896) 34 N. B. 127.

[394] (1883) 2 O. R. 118. *Cf. Ganong* v. *Bayley* (1877), 1 P. & B. 324. See this case referred to, *supra*, p. 527, and *infra*, p. 557.

[395] For some discussion of the meaning of these words here, and in section 101, see the Articles on provincial jurisdiction over

In his report on the Quebec District Magistrates Act, 1888, already referred to,[397] Sir John Thompson refers to a report of the then Minister of Justice, of October 3rd, 1877, against an Ontario enactment providing that the stipendiary magistrate of certain territorial Districts should act as a Division Court judge, with like jurisdiction and powers as were possessed by County Court judges in Division Courts in the counties, as being in conflict with section 96 of the British North America Act.[398] The jurisdiction of the Court in question only reached $100, except by consent of parties, and he refrained from recommending disallowance. He took special exception, however, to the provision that all enactments from time to time in force in Ontario, relating to Division Courts in counties, should apply to the Division Courts of these districts, stating that, while it might be " quite within the legislature of Ontario to increase the jurisdiction of the Division Courts in counties, as such Courts are now presided over by judges appointed by the Dominion," the attempt to exer-

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civil procedure in vol. 2 of the *Canadian Law Times*, especially at p. 521 *seq.*, and 561 *seq.;* and, also an Article on the power of provincial legislatures to limit appeals to the Supreme Court, *ibid.*, at p. 416 *seq.* *Cf.* also, *In re Small Debts Act* (1896), 5 B. C. 246, where a provincial statute providing that stipendiary magistrates and police magistrates shall have jurisdiction to hear and determine actions of any kind of debt where the sum demanded does not exceed $100, was held *ultra vires*. See, also, *supra*, p. 528.

[396] (1888) 15 O. R. 398.

[397] *Supra*, p. 525.

[398] See *supra*, pp. 153-6.

cise that power in relation to Division Courts presided over by judges appointed by Ontario would be objectionable; and he intimated that the Act would be disallowed unless amended.[399] The same objection was conveyed in a report of the same Minister (the Honourable R. Laflamme) in reference to New Brunswick legislation on December 22nd, 1877.[400]

Provincial judicial officers (continued)—Parish Courts.—In *Ganong* v. *Bayley*,[401] where as we have already seen the proper interpretation of section 96 of the British North America Act,[402] came before the New Brunswick Supreme Court, the question was whether an Act of the legislature of New Brunswick whereby it was provided that Courts should be established for the trial of civil cases where small amounts were involved, before Commissioners appointed by the Lieutenant-Governor in Council, and known as Parish Courts, was *intra vires*. The Court agreed in interpreting section 96 by a reference to Courts existing before Confederation; and the majority of the judges held that, as the Parish Courts in question were not such Courts as were referred to in that section, there was nothing to prevent the local legislature authorizing the Lieutenant-Governor to appoint judges to them by virtue of the power of legislation given by No. 14 of section 92, in relation to the administration of justice in the province, including the constitution, maintenance, and organization of provincial Courts.[403]

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[399] Hodgins' Prov. Legisl., 1867-1895, pp. 362-3. Legislative Power in Canada, pp. 162-3.

[400] *Ibid.*, p. 719.

[401] (1877) 1 P. & B. 324.

[402] See Appendix of Statutes; and *supra*, pp. 526-540.

In a report of December 31st, 1901, referring to a New Brunswick Act of 1901, to provide for the establishment of District Courts with jurisdiction limited to small cases not exceeding $80 in matters of contract, and $40 in matters of tort, the Minister of Justice says: "If these Courts are District Courts within the meaning of section 96 of the British North America Act, it is certain that the statute is *ultra vires* so far as it authorizes the Lieutenant-Governor to appoint the Commissioners who are to preside as judges of the Courts. The Courts appear, however, to be intended to take the place of the Parish Courts, and Magistrates' Courts, having limited civil jurisdiction heretofore established, and they are not Courts in the opinion of the undersigned, having the dignity of the District Courts intended by the British North America Act. He recommends, therefore, that the statute ought not to be disallowed.[404]

Provincial judicial officers (continued) — Fire Marshals.—In *Regina* v. *Coote*,[405] the Privy Council held that certain Quebec statutes appointing officers, named Fire Marshals, with power to examine witnesses under oath, and to enquire into the cause and origin of fires, and to arrest and commit for trial in the same manner as a justice of the peace, was within the competence of the provincial legislature. Their lordships, however, do not state their reasons for so holding.

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[403] See this case referred to in Sir John Thompson's Report as Minister of Justice on the Quebec District Magistrates' Act, 1888: Hodgins' Prov. Legisl., 1867-1895, p. 365; Legislative Power in Canada, at pp. 169-170. The Parish Court, as there stated, was a Court for the recovery of debts under $40.

[404] Provincial Legislation, 1901-1903, p. 32.

[405] (1873) L. R. 4 P. C. 599. This case is referred to by Sir J. Thompson in his report on the Quebec District Magistrates' Act, 1888: Hodgins' Prov. Legisl., 1867-1895, p. 364; Legislative Power in Canada, pp. 166-168.

Provincial judicial officers (continued) — Magistrates and justices of the peace. — In *Regina* v. *Horner,*[406] Ramsay, J., delivering the judgment of the Quebec Court of Queen's Bench, upheld certain Quebec Acts respecting District Magistrates, and Magistrates' Courts, in that province, and the right of the provincial Executive to appoint District Magistrates under their provisions. It was contended that the Quebec legislature had no authority to legislate on these matters, and that, even if it had, the Lieutenant-Governor had no right to appoint a District Magistrate, for that he was a District judge, and under section 96 of the British North America Act, the Governor-General alone has power to appoint such officers. Ramsay, J., however, held that the District Magistrate was not a District judge under that section; and that, on the authority of *Regina* v. *Coote,*[407] above cited, and on the general principle that executive power is derived from legislative power, unless there be some restraining enactment,[408] the provincial Executive had power to appoint the District Magistrates in question. But Sir John Thompson, in a passage in his report concerning the Quebec District Magistrates' Act, 1888, already cited,[409] shews that *Regina* v. *Coote* really has little or no bearing upon the subject before the Court in *Regina* v. *Horner;* and says that the latter case " altogether may be considered as far from a conclusive authority, without disrespect for the eminent tribunal which pronounced the decision."

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[406] (1876) 2 Steph. Dig. 450.

[407] (1873) L. R. 4 P. C. 599. *Supra*, p. 558.

[408] See *supra*, pp. 24-25.

In *Regina* v. *Bennett*,[410] however, the Ontario Queen's Bench Division held that the right of provincial legislatures to legislate in relation to the administration of justice includes a right to provide for the appointment of police magistrates,[411] and justices of the peace, by the Lieutenant-Governor. And, again, the same Court held in *Regina* v. *Bush*,[412] that, under No. 14 of section 92, provincial legislatures have not only the power, but the exclusive power, to pass laws providing for the appointment of justices of the peace, subject to the Royal prerogative power of appointment, which, they hold, still exists. Armour, C.J., says, in that case:[413] " Laws providing for the appointment of justices of the peace are, it is contended—and, I think, rightly—laws in relation to the administration of justice, for the appointment of justices of the peace is a primary requisite to the administration of justice; and if this contention be correct, the passing of such laws is exclusively within the power of the provincial legislatures." And he cites the cases of *Queen* v. *Reno,* and *Regina* v. *Bennett,* above referred to.

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[409] See *supra*, p. 525.

[410] (1882) 1 O. R. 445.

[411] See to same effect, *Queen* v. *Reno* (1868), 4 O. L. R. 281.

[412] (1888) 15 O. R. 398.

[413] At p. 400.

In the previous case of *Richardson* v. *Ransom,*[414] Wilson, C.J., while expressing the view that local legislatures can provide for the appointment of justices of the peace, was evidently not so clear as the judges who decided *Regina* v. *Bush, supra,* that they had the exclusive power. He says:[415] "The Dominion parliament has, by section 91 of the British North America Act, power 'to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.' It is not necessary to enquire how far that enactment would enable the Dominion parliament to legislate with respect to the appointment of justices of the peace and police magistrates in any province of the Dominion, and to authorize the Governor-General to make such appointments, as with relation to the public works, or the management of Indian affairs, or by declaring that an Indian agent shall have the same power as a stipendiary magistrate."

In his report, as Minister of Justice, on the New Brunswick Acts of 1889, Sir John Thompson says that he "again desires to express his doubts as to the right of the Lieutenant-Governor to appoint, or of a provincial legislature to authorize the appointment of, justices of the peace, or other judicial officers. The question is one of difficulty, and there have been decisions both ways, but no final Court of appeal has expressly formulated a judgment upon it;" and referring to a recent case, which is evidently *Regina* v. *Bush* (*supra,* p. 560), he strongly objects to the argument based in the judgments of that case on the acquiescence of the Dominion Parliament.[416]

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[414] (1886) 10 O. R. 387.

[415] At p. 392.

In *The King* v. *Sweeney,*[417] however, the Supreme Court of Nova Scotia has held that under No. 14 of section 92, provincial legislatures have power to appoint stipendiary magistrates, although the power to appoint judges of Superior,

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[416] But in a report of the same year (Hodgins' Prov. Legisl., 1867-1895, at pp. 752; 372; Legislative Power in Canada, pp. 174-5) in reply to an answer made by the Quebec Government to his report on the Quebec District Magistrate's Act, 1888, so often already referred to, Sir John Thompson repudiates the idea that he maintains the opinion that the local legislatures have no power to create Courts, of no matter how small jurisdiction, where judges shall be appointed by the local executives, and he adds, with reference to his report on the Quebec District Magistrates' Act, 1888, that he "distinctly declared in that report that that was not a matter involved in the discussion, as the legislature of Quebec in enacting the District Magistrates' Act, and the Quebec Government, in making the appointments, had clearly invaded the powers of Parliament, and of your Excellency, even though the power to appoint some classes of officers with judicial functions, might be with the local authority. . . . The view (set forth in that report) has been taken by nearly all the Ministers of Justice since the union of the provinces, namely, that the words of the British North America Act, referring to 'Judges of the Superior, District and County Court,' include all classes of judges like those designated, and not merely the judges of the particular Courts which, at the time of the passage of the British North America Act, happened to bear those names." As to acquiescence of the Dominion parliament, see *supra*, pp. 215-7.

[417] (1912) 1 Dom. L. R. 476.

District, and County Courts, is reserved to the Governor-General of Canada. Russell, J., delivering the judgment of the Court, says (p. 480):—"The power thus to legislate has been practically unquestioned for twenty years or more, and no serious objection has been taken to such legislation on the part of the Dominion authorities for many years, although questions were raised at one time when the Constitution of the country was not so well understood as at present.[418]

And so in *Ex parte Vancini,*[419] the Supreme Court of New Brunswick held that a provincial Act which created stipendiary and police magistrates a Court with all the powers and jurisdiction which any Act of the parliament of Canada had conferred, or might confer, was *intra vires.* The case went to the Supreme Court,[420] where, however, it was found unnecessary to pass upon this provincial Act.[421]

It may be suggested that the true solution, on strict constitutional theory, of the question of the power to appoint justices of the peace, lies in the application of the principle that executive power is derived from legislative power[422] to

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[418] See to same effect, *The King* v. *Basker* (1912), 1 Dom. L. R. 295.

[419] (1904) 36 N. B. 456. Followed *Geller* v. *Loughrin* (1911), 24 O. L. R. 18, see at pp. 23, 33.

[420] 34 S. C. R. 621.

[421] In the Court below, Hannington, J., says (36 N. B. at p. 464):—"It is contended that the provincial Act in terms authorizes the parliament of Canada to establish Criminal Courts; this it could not do, and did not contemplate doing, and the language used had no such meaning." *Sed quœre,* as to this suggested limitation on provincial legislation. It is submitted that the provincial legislature could give such authority; and could, also, at any time, withdraw it. See *supra,* pp. 71-73.

[422] *Supra,* pp. 24-25.

Nos. 14 and 15 of the British North America Act, so that provincial legislatures may have power to appoint, and to authorize the appointment of justices of what may be termed the provincial peace, for the enforcement of laws under No. 15 of section 92, while the Dominion parliament alone has such power as to the Dominion peace, that is as to justices to enforce criminal laws within the meaning of No. 27 of section 91, saving always the King's prerogative, where that has not been controlled by valid legislative enactment.[423]

Provincial judicial officers (continued)—Master in Chambers; Master in Ordinary; and local Masters, Judges, and Referees.—In *Regina ex rel. McGuire* v. *Birkett*,[424] following the principle of *Wilson* v. *McGuire*,[425] it was held that the provincial legislatures had power to invest the Master in Chambers at Toronto with authority to try controverted municipal election cases, for, says MacMahon, J., (at p. 173): "As the provincial legislature has the exclusive right to make laws relating to municipal institutions, it carries with it the authority to create the tribunal for the trial of contested elections, and the appointment of a magistrate, or other officer, to hear and determine the validity thereof," subject, of course, as he intimates, to section 96 of the British North America Act, by which the power to appoint Superior, District, and County Court judges rests with the Governor-General. In *In re Dominion Provident Benevolent and Endowment Association*,[426] the question arose as to the power of the Ontario legislature to confer upon the Master in Ordinary the powers it assumed to confer upon him by the Ontario Insurance Corporations Act, 1892, and it was held that it had such power. This Act provided for the appointment of a receiver after cancellation of a corporation's registry under the Act; and enacted that the Master ' shall settle schedules of creditors and contributories, direct the realization of assets, the discharge of liabilities, and the distribution of the surplus . . . and generally shall have all the powers which might be exercised on any reference to him, under a judgment or order of the High Court.''

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[423] *Cf. In re Neagle* (1890), 135 U. S. 1, where the head note reads: "An assault upon a judge of the United States while in the discharge of his official duties, is a breach of the peace of the United States, as distinguished from the peace of the State in which the assault takes place."

[424] (1891) 21 O. R. 162.

[425] (1883) 2 O. R. 118. *Supra*, p. 555.

By a report of January 30th, 1882, Sir Alexander Campbell, then Minister of Justice, took exception to a provision of the Ontario Judicature Act, 1881, constituting the judges of County Courts, Official Referees and local Masters.[427] He says: " The undersigned thinks it doubtful whether the provincial legislature can constitutionally in this manner appoint judges, who hold office by commissions from your Excellency, to other offices under the provincial Government. The expediency of allowing County Judges to act as Referees and local Masters is questionable, and the same may at some future time require the consideration of Parliament. Should Parliament think proper to legislate upon the subject it is evident that the provisions last referred to of the Act now under consideration would become inoperative.

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[426] (1894) 25 O. R. 619. As to this case see, also, *supra*, p. 486. *Cf. Ross* v. *Canada Agricultural Ins. Co.* (1882), 5 L. N. 22.

[427] Referred to by Sir John Thompson in his report on the Quebec District Magistrates' Act, 1888; Hodgins' Prov. Legisl., 1867-1895, p. 363; Legislative Power in Canada, pp. 164-5.

Provincial judicial officers (continued)—Railway Committee.—In a report of March 24th, 1892, upon a Quebec Act, empowering the Lieutenant-Governor in Council, upon the report of the Railway Committee of the Executive Council, to cancel the charter of any railway company incorporated under the laws of the province in certain cases, Sir John Thompson, as Minister of Justice, says: " It may be objectionable, as it transfers to the Railway Committee of the Executive Council of the province powers, functions, and responsibilities which are generally reposed by legislation in legal tribunals, and does not establish the safeguards which legal procedure possesses; but it seems clear that a legislature may invest other bodies than the Courts with such powers and functions without exceeding its jurisdiction. It will be observed that the Minister is here speaking of the power of the provincial legislature to create a special tribunal for the determination of a special matter, and not of the power to confer general jurisdiction.[427a]

[427a] In *In re Queen's Counsel* (1896), 23 O. A. R. 792, the Ontario enactment (see now R. S. O. 1897, c. 51, s. 87) whereby a judge of the Supreme Court in that province had the power of deputing any of Her Majesty's counsel to perform his judicial duties, both civil and criminal at the Assizes, is referred to by Burton, J.A., at p. 799, who says: "Serious consequences might ensue, as,

Such, then, are the decisions on the subject of provincial right to appoint judicial officers; and it all seems to come back to this, that provincial legislatures have no power to appoint, or to authorize the Lieutenant-Governor to appoint, any judicial officers to exercise a similar general jurisdiction to that exercised by the Superior, District, and County Court judges in the different provinces within the meaning of section 96 of the British North America Act (excepting, always, the Courts of Probate in Nova Scotia and New Brunswick), no matter under what name they exercise it; and provincial judicial officers assuming to do so are acting without jurisdiction.

It remains to notice certain other things which it has been held that the provincial legislatures can, or cannot, do, under No. 14 of section 92.

Provinces may charge expenses of criminal prosecutions on municipalities.—In *McLeod* v. *Municipality of King*,[428] the Supreme Court of

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in the event of a Queen's counsel being so deputed who did not hold his commission from the proper authority, all the proceedings would be illegal, and *coram non judice*, and convictions even in capital cases invalidated." Maclennan, J.A., however, at p. 811, says:—"It is said that inasmuch as the appointment of judges of provincial Courts is a Dominion matter, and as Queen's counsel have long been eligible to be called upon in emergency to act as judges, the provinces can have no authority. The answer to that is that but for the express authority given to the Dominion Government to appoint the judges, their appointment would also have been a matter within No. 4 (provincial offices) or No. 14 (administration of justice) of section 92." *Sed quære.* See text. On appeal to the Privy Council in this matter, this subject is not dealt with: [1898] A. C. 243.

[428] (1900) 35 N. B. 163.

New Brunswick held a provincial Act making certain expenses in criminal prosecutions, *e.g.,* the travelling expenses of the prosecutor, and the witnesses for the prosecution, and a reasonable amount for the services and expenses of constables, clerks of the peace, etc., chargeable upon the municipalities, *intra vires,* under No. 14 of section 92, as against the contention that it related to subjects which by Item 27 of section 91 of the British North America Act (the criminal law and procedure in criminal matters) are exclusively entrusted to the federal Government.

Province can authorize service of writs out of the jurisdiction.—In *McCarthy* v. *Brener,*[429] Scott, J., held that a local ordinance providing for, and regulating the service of, writs of summons outside the Territories was *intra vires,* for he says (p. 233): " I see no reason why a colony having authority to establish Courts of civil jurisdiction, and to provide for procedure therein, should not be held to have authority to include in such procedure, a practice which forms part of the code of procedure of every civilized nation."

Province can regulate the effect of judgments and writs of execution. — In *Attorney-General of Ontario* v. *Attorney-General of Canada,*[430] the Privy Council, referring to the provision of the Ontario Act respecting assignments for the benefit of creditors, whereby executions not completely satisfied by payment, are postponed to an assignment for the general benefit of creditors under the Act, say:[431] "Now there can be no doubt that the effect to be given to judgments and executions, and the manner and extent to which they may be made available for the recovery of debts, are *prima facie* within the legislative powers of the provincial parliament. Executions are a part of the machinery by which debts are recovered, and are subject to regulation by that parliament."

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[429] (1896) 2 Terr. L. R. 230. See also *Stairs* v. *Allan* (1896), 28 N. S. 410, at pp. 418-9, and *supra,* p. 516. *Cf.,* however, *Deacon* v. *Chadwick* (1901), 1 O. L. R. 346.

[430] [1894] A. C. 189.

In *Ex parte Ellis*,[432] the Supreme Court of New Brunswick held valid a provincial Act which provided for the imprisonment of a person making default in payment of a sum due on a judgment, in case (amongst other things) the liability was incurred by obtaining credit under false pretences, or by means of any other fraud, or by the commission of an act for which he might be proceeded against criminally. It was contended that this was *ultra vires,* because it indirectly attempted to punish a person for criminal offences, and created a tribunal to adjudicate thereon, and that this was legislating on the criminal law, and Weldon, J., so held; but the majority of the Court held the Act valid, because, rightly viewed, it was an Act for enforcing the payment of judgments, and, in the words of Allen, C.J.: "Surely the enforcing the payment of a judgment is a civil right, and the mode of enforcing it a part of the administration of justice and procedure in civil matters in the province, all of which are expressly within the jurisdiction of the provincial legislature." And in connection with this case of *Ex parte Ellis,* may be mentioned *Re Stinson and College of Physicians,*[433] where Riddell, J., held that the provisions of Ontario statutes conferring power on the Council of the College of Physicians and Surgeons of Ontario to erase from their register the name of a practitioner for misconduct amounting to an indictable offence, although he has not been convicted of the offence, is not *ultra vires,* because an enquiry under it " is not a criminal trial, involving punishment for the crime alleged; it is merely the determination of facts upon which the civil rights of the accused may depend, just as an enquiry under R. S. O. 1897, c. 172, s. 44, by the Benchers of the Law Society. . . . It is not a matter of criminal law, but of civil rights:" (p. 634).

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[431] At p. 198.

[432] (1878) 1 P. & B. 593.

In *Baie des Chaleurs R. W. Co.* v. *Nantel,*[434] the Quebec Court of Queen's Bench held that a provincial statute which provided for the sequestration of the property of a railway company subsidized by the province, when such company was insolvent, or had not complied with its charter, or had ceased to work its road, and that the sequestrator should take possession and perform all acts necessary for the construction, maintenance, administration, and working of the railway, and that, if he had not the means at his disposal for that, the Court might order the sheriff to seize and sell the road and its rolling stock—applied, and was *intra vires* as applying—to a railway company under the legislative jurisdiction of the Dominion parliament. The majority of the Court held the Act merely one of procedure in order to attain a judicial sale, and that its provisions were accessory to that end, Pagnuelo, J., the judge of first instance, whose decision was affirmed, observing that if there were a Dominion law providing for the liquidation of such insolvent railways, the provincial legislature could not interfere, but there was no such law. Hall and Wurtele, JJ., however, dissented, and held the Act *ultra vires;* Hall, J., because the sequestration provided for was not merely of a preservative and temporary character, and as an interim procedure simply in contemplation of a definite sale, but involved the administration and operation of the railway as a "going concern."[435] Wurtele, J., took the ground that the Act was not one merely enacting rules of procedure for carrying on proceedings by which an existing right in the property of a federal railway was sought to be enforced (such apparently as a right to seize under a judgment), which he held would be *intra vires,* but created a right which did not exist when the railway was made a federal railway.

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[433] (1911) 22 O. L. R. 627.

[434] (1896) R. J. Q. S. C. 47, 5 Q. B. 65. See this case noted *supra*, pp. 290, 361, *sub* No. 29 of section 91.

Provinces cannot legislate as to proceedings under Dominion Acts, unless, perhaps, in aid and furtherance thereof.—In the *Queen* v. *De*

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[435] R. J. Q. 5 Q. B. at pp. 70-2.

Coste,[436] Townshend, J., held that the local legislature had no power to confer jurisdiction, or to legislate at all, in reference to proceedings taken under the Canada Temperance Act, as by conferring authority on the Courts to grant writs of *certiorari;* that such authority conferred by the local legislature must of necessity be limited to those matters over which it has power to legislate. And so in *Regina* v. *Eli*,[437] Osler, J.A., seems to clearly indicate the view (though not necessary to the decision of the case) that it would be *ultra vires* of a provincial legislature to confer a right of appeal from judgment on *certiorari* quashing a conviction under the Canada Temperance Act.

It may well be, however, that provincial legislation in aid and furtherance of Dominion Acts is unobjectionable. Thus in *Ex parte Whalen*,[438] a New Brunswick statute authorizing municipalities to appoint inspectors to search out and prosecute all offenders against the Canada Temperance Act was held *intra vires,* as relating to the administration of justice in the province. On the same principle, no doubt, may be supported *Matthew* v. *Wentworth,*[439] which decided that the provincial legislature had the right to enact such provisions as were necessary to restrain abuses in the sale of liquor for medical purposes under section 12 of the Temperance Act, 1864. So also the report of Sir John Thompson, as Minister of Justice, of March 21st, 1891, on a Manitoba Act of 1891, respecting the diseases of animals, where he speaks of provincial enactments in aid of Dominion laws as to quarantine and contagious diseases.[440]

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[436] (1888) 21 N. S. at p. 216. *Cf. Regina* v. *Lake* (1878), 43 U. C. R. 515; also *McLeod* v. *Noble* (1897), 28 O. R. 528, where held that the House of Commons of Canada alone has the right to determine all matters not relegated to the Courts concerning the election of its own members, and their right to sit and vote in Parliament; and that the High Court had no jurisdiction to enjoin the prosecution of proceedings connected with controverted elections of the Dominion, such as a recount, under R. S. C. (1886), c. 8, s. 64, the Act respecting election of members of the House of Commons. In a proceeding in the Exchequer Court of Canada, a Dominion Court, if a conflict arises between the rules of evidence established by a provincial statute and those subsisting by virtue of a Dominion statute, the latter will prevail: *The Queen* v. *O'Bryan* (1900), 7 Ex. C. R. 19.

[437] (1886) 13 O. A. R. at p. 533.

[438] (1891) 30 N. B. 586; noted *sub nom. Ex parte Wergman*, 11 C. L. T. 182.

Pardoning power not part of the administration of justice.—The pardoning power has already been referred to in reference to the position of the Crown in Canada,[441] but it may be here mentioned that in a despatch sent by Sir J. Young of February 24th, 1869, after consulting the law officers of the Crown in reference to the pardoning power,[442] Lord Granville remarks that it cannot " be properly said that the prerogative of mercy is part of the administration of justice, still less can it be argued that the Lieutenant-Governor possesses the power of pardon because the administration of justice in the province is reserved to the provincial legislature."

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[439] (1895) R. J. Q. 4 Q. B. 343.

[440] Hodgins' Prov. Legisl., 1867-1895, p. 947. And see *supra*, pp. 245-6.

[441] *Supra*, pp. 22-23.

[442] Dom. Sess. Pap., 1869, No. 16.

15. The imposition of punishment, by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in section 92.

Applies to No. 16 as well as to the preceding classes of subjects.—In the argument in *Russell* v. *The Queen,*[1] before the Privy Council, considerable discussion arose among members of the Board as to whether, or not, the above item of section 92 of the British North America Act applies to the subsequent item No. 16, not only because of its position, but upon the ground suggested by Sir Barnes Peacock, that No. 16 is not one of the 'subjects enumerated in this section,' but " is general, and, therefore, the 15th clause is put in before the 16th." Their lordships finally come round to the conclusion, however, that No. 16 must be considered one of the 'subjects enumerated.' And in the subsequent case of *Hodge* v. *The Queen,*[2] they applied No. 15 to No. 16 and held that the portions of the Ontario Liquor License Act with which they had to deal, came within Nos. 8, 15, and 16 of section 92,[3] and not within section 91. And, as we shall see, there is a large body of provincial penal and 'police regulation,' as it is often termed, which rests upon a combination of No. 15 and No. 16. As the Lord Chancellor put it, on the argument in the

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[1] (1882) 7 App. Cas. 829. Transcript from shorthand notes of Marten & Meredith, in possession of the department of Justice at Ottawa, 2nd day, at p. 95, *et seq.*

[2] (1883) 9 App. Cas. 117.

[3] That is, they came within the three conjointly.

Lord's Day Act case:[4] "You must first get the subject within the province, and within its jurisdiction, and then you may fortify that by fines, or imprisonment, or what not, but you must first get the thing within the provincial jurisdiction.[5]

Fine and imprisonment.—In *Paige* v. *Griffith*,[6] Sanborn, J., says: "The British North America Act conferring legislative powers, is not to be construed rigorously like a penal Act conferring judicial powers;[7]" and he dissents, therefore, from the view of Drummond, J., and Torrance, J., in *Ex parte Papin*,[8] that since No. 15 of section 92 says 'fine, penalty, or imprisonment' (provincial) legislatures could not authorise punishment by both fine and imprisonment, for he says: "Prior to the British North America Act there can be no doubt that each province had the power to enforce laws which now relate to subjects under the exclusive jurisdiction of the provincial legislature by fine, penalty, and imprisonment,'' and " it is a generally accepted doctrine that where the Imperial Government has granted powers to a colony, it never withdraws them,'' citing *Phillips* v. *Eyre.*[9] And the view thus expressed in *Paige* v. *Griffith,* was followed in the subsequent case of *Aubry* v. *Genest.*[10]

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[4] *Attorney-General for Ontario* v. *Hamilton Street R. W. Co.*, [1903] A. C. 524.

[5] Shorthand report of Marten, Meredith, Henderson, & White, p. 46. In *Regina* v. *Frawley* (1882), 7 O. A. R. at p. 269, Spragge, C., holds that provincial legislatures would have had this power even without No. 15 of section 92, as incidental to their constitution. And Dugas, J., in *Regina* v. *Harper* (1892), R. J. Q. 1 S. C. at p. 333, says that "the same power exists for the other laws which come within their" (*sc.* the local legislatures) "jurisdiction under the other parts of the Constitution, notwithstanding the fact, that nothing is said about it." And as to the implied powers of Congress to declare acts of disobedience to its measures to be crimes, and affix punishments, though possessing no such general jurisdiction, over criminal law as the Dominion parliament has: see per Osler, J.A., in *Regina* v. *Wason* (1890), 17 O. A. R. at p. 243.

[6] (1873) 18 L. C. J. at p. 122.

[7] See *supra*, pp. 18-19.

[8] (1871-2) 15 L. C. J. at p. 334.

Hard labour.—In *Hodge* v. *The Queen,*[11] the Judicial Committee held that ' the imposition of punishment by fine, penalty, or imprisonment,' in this sub-section of section 92 includes imprisonment with hard labour, not, however, elaborating the point, but merely saying: " Under these very general terms, ' the imposition of punishment by imprisonment for enforcing any law,' it seems to their lordships that there is imported an authority to add to the confinement or restraint in prison that which is generally incident to it, ' hard labour '; in other words that ' imprisonment there means restraint by confinement in a prison, with or without its usual accompaniment, hard labour." The Court of Appeal for Ontario had previously decided the same point in the same way in *Regina* v. *Frawley.*[12]

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[9] (1870) L. R. 6 Q. B. 1. This might be qualified by adding "except on request of the colony," remembering the case of Jamaica in 1860: Todd's Parl. Gov. in Brit. Co., 2nd ed. p. 103; Froude's West Indies, pp. 201-2.

[10] (1895) R. J. Q. 4 Q. B. 523. As to the legislature of the North-West Territories (and so too, it is submitted provincial legislatures) having jurisdiction as to the disposal of fines, forfeitures, and penalties imposed under the authority of their own Ordinances, but none in cases arising under Dominion laws, see Report of Mr. David Mills, as Minister of Justice, of August 12th, 1898: Hodg. Prov. Legisl. 1896-8, pp. 118-9. As to the latter point, however, and the right to legislate respecting the forfeiture of goods of a felon, see *Dumphy* v. *Kehoe* (1891), 21 R. L. 119.

[11] (1883) 9 App. Cas., at p. 133.

May impose forfeiture of goods as punishment.—*King* v. *Gardner,*[13] is authority for the provincial power to impose forfeiture of goods as punishment under No. 15 of section 92, if not under No. 13 (' property and civil rights in the province '), notwithstanding some remarks of Sir Barnes Peacock in the course of the argument in *In re Dominion License Acts,* 1883-4,[14] indicating a view the other way.

Reimprisonment of debtor enlarged on bail.—In *Quebec Bank* v. *Tozer,*[15] Casault, J.C., held that the provision of the Code of Civil Procedure of Quebec that the Court might sentence a debtor who, having been arrested on a *capias,* has been enlarged on bail, to an imprisonment for an indeterminate period, if the *capias* is afterwards sustained, is *intra vires,* though he points out that this provision could not properly be said to impose a penalty or punishment, but simply replaced the defendant in the same position, as he was in before he was let out on bail, and was a means of execution whereby the debtor might be compelled to divest himself of property detained by him in fraud of his creditors.

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[12] (1882) 7 O. A. R. 246. See also *Blouin* v. *Corporation of the City of Quebec* (1880), 7 Q. L. R. 18. It had been held otherwise in the Quebec Superior Court in *Poitras* v. *Corporation of Quebec* (1879), 9 R. L. 531. And see *Hodge* v. *The Queen*, commented in by "R.," in 7 L. N. at p. 49; and by Dr. Francis Wharton, *ibid.*, at pp. 169, 177.

[13] 25 N. S. at pp. 52-4. As to a provincial legislature having power to prov'de in a Prohibition Act that liquor seized under the Act shall be confiscated, see *Matthews* v. *Jenkins* (1907), 3 E. L. R. 577, (P.E.I.).

[14] At pp. 141-2. As to Dominion power to impose forfeiture as punishment, *e.g.* the forfeiture of money found in a common gaming house, see *O'Neil* v. *Tupper* (1896), R. J. Q. 4 Q. B. 315, 26 S. C. R. at p. 132.

[15] (1899) R. J. Q. 17 S. C. 303.

Industrial Schools.—When in 1910, Ontario passed a statute respecting Industrial Schools providing that where under the authority of any Ontario statute, or of any other statute, or law of Canada, any person is convicted of an offence, punishable by imprisonment, and the judge before whom he is convicted is of opinion that such offender is under 16 years of age, the judge may make an order in writing that the person so convicted shall be sent to an Industrial School, Sir Allen Aylesworth, Minister of Justice, by his report of Dec. 13th, 1910, expressed the view that this provision was *ultra vires* in so far as it authorised an Industrial School as a place of confinement for persons convicted of criminal offences within the jurisdiction of the Dominion parliament, and recommended that it should be suggested to the provincial Government to promote an amendment to the section to confine it within its legitimate sphere, viz., cases of conviction under local statutes, a matter within the authority of the provincial legislature.

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Provinces may vest the pardoning power in case of offences against provincial Acts in the Lieutenant-Governor.—An Ontario Act, which expressly vested in the Lieutenant-Governor of the province the power of commuting and remitting sentences for offences against the laws of the province, or offences over which the legislative authority of the province extended, was held *intra vires* in *Attorney-General of Canada* v. *Attorney-General of Ontario.*[16]

In the Court of first instance, Boyd, C., says:[17] " The power to pass laws implies necessarily the power to execute or suspend the execution of these laws, else the concession of self-government in domestic affairs is a delusion."[18]

Provinces may delegate their powers under No. 15 of section 92.—In accordance with the plenary powers of the provincial legislatures within their prescribed sphere,[19] the Privy Council held in *Hodge* v. *The Queen,*[20] that the Ontario legislature had power to entrust to a Board of Commissioners authority to enact regulations in the nature of by-laws and municipal regulations of a merely local character, for the good government of taverns; and thereby to create offences and annex penalties thereto, in the manner purported to be done by the Ontario Liquor License Act, which they were considering. And when in *Tarte* v. *Beique*,[21] Wurtele, J., held that a provincial legislature has no power to decree that the punishment of an offender against provincial laws "shall be at the discretion and according to the will of the Court before which he may be tried," he was overruled on appeal.[22]

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[16] (1890-4) 20 O. R. 322, 19 O. A. R. 31, 23 S. C. R. 458. See this case also referred to *supra*, p. 385; and in 10 C. L. T. at p. 233, and 26 C. L. J at p. 459.

[17] (1890) 20 O. R. at pp. 249-50. As to pardoning power generally, see *supra*, pp. 22-23.

[18] As to whether the Lieutenant-Governors would have this power *virtute officii* without any such express enactment, see pp. 27-29.

[19] See *supra*, pp. 64-76; 184-198.

[20] (1883) 9 App. Cas. 117.

Provincial penal laws.[23]— The general relation of No. 15 of section 92 now under review, to No. 27 of section 91 whereby the Dominion parliament has exclusive legislative authority

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[21] (1890) M. L. R. 6 S. C. at p. 296.

[22] *Sub nom. Turcotte* v. *Whalen*, M. L. R. 7 Q. B. 263. The actual decision of Wurtele, J., which was thus over-ruled, was that a provision of a Quebec statute that the Lieutenant-Governor should have the same power to enforce the attendance of witnesses on commissions of enquiry issued by him in respect to any matters connected with the good government of the province, and to compel them to give evidence, 'as is vested in any Court of law in civil cases' was *ultra vires*. So far as appears from the report of the case in appeal, the Court did not state its reasons.

[23] **Penal Laws.** 'Those laws which prohibit an act, and impose a penalty for the commission of it;' *sub voc.* Murray's Oxford Dict. "There are many crimes properly so called which are liable to be punished on summary conviction. But there are a vast number of acts, which in no sense are crimes, which are also so punishable; such, for instance, as keeping open public houses after certain hours, and a variety of breaches of police regulations which will readily occur to the minds of anyone:" per Martin, B., in *Attorney-General* v. *Radloff* (1854), 10 Ex. at p. 96: cited per Parker, J., in *Ex parte Green* (1900), 35 N. B. at p. 148. 'We cannot say with anything like that unvarying precision which a definition requires, that a legal wrong is a crime if it tends to cause evil to the community. Nay, it does not necessarily become a crime even when this public evil tendency is expressly recognised by law, and made the sole ground for legally prohibiting the hurtful conduct. For there is still in English law a well-known class of proceedings called 'penal actions' by which pecuniary penalties can be recovered by an informer who will sue for them from the

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doers of various prohibited acts, these acts being thus prohibited and visited with penalties, solely on account of their tendency to cause evil to the community at large, considered as a community. Yet the litigation by which an informer enforces such a penalty against a wrongdoer is not treated by English law as a criminal, but as a civil proceeding; and the wrong done itself is not regarded as a crime. This anomalous method of checking ill-doing has long been discredited, but in the early part of the 19th century it was so popular with parliament that every session saw new instances of it enacted:' Kenny's Criminal Law at pp. 7-8. As to the difficulty of drawing the line between what is within No. 27 of section 91 and what is within No. 15 of section 92, see the report of the Minister of Justice of March 14th, 1895, on a Nova Scotia Act respecting the use of tobacco by minors: Hodgins' Prov. Legisl. 1867-1895, at p. 762. In *Ouimet* v. *Bazin* (1910), R. J. Q. 20 K. B. at p. 423, Archambault, J., attempts to draw it by distinguishing between *mala in se* and *mala prohibita*. He says: "A provincial legislature cannot legislate on a *malum in se* because it would be a criminal law, but it can inflict a penalty or imprisonment for the violation of laws which it passes within the limits of its legislative power, and the act thus prohibited does not thereby become a criminal act, a *malum in se*, but simply a *malum prohibitum*. *Mala prohibita* can be decreed by the federal parliament, as well as by the provincial legislatures; that is to say, the federal parliament like the provincial legislature, can inflict punishments by way of penalty or imprisonment, as a sanction to law which it passes within its jurisdiction, without thereby, making the acts thus forbidden, criminal offences. Thus, I do not consider that the federal law which compels federal companies to inscribe under pain of penalty, the word 'limited' after their corporate name, makes the violation of this requirement, a criminal offence. I quite admit with the Supreme Court judges who have expressed their opinion to that effect in the case of *L'Association St. Jean-Baptiste* v. *Brault* (1900), 30 S. C. R. 598" (see *supra*, p. 327), "that from the moment when the federal parliament passes a law declaring that an act shall be in future a criminal act, the provincial legislatures cannot legislate in the matter, if they have been able to up to that moment. But still it is necessary that the federal parliament expressly declare that the acts in question shall be in future criminal offences. Otherwise it would be impossible, it seems to me, to reconcile the provision of No. 15 of section 92 of our Constitution, which gives a right to the provinces to inflict punishments under the form over criminal law, has already been discussed.[24] It was there stated that,[25] although the Dominion parliament has apparently power to prohibit and punish any act as a crime, except a mere breach of a provincial law validly made under one of the clauses in section 92, and although it cannot be denied that Parliament can draw into the domain of criminal law any act which has hitherto been punished only under a provincial statute,[26] it does not follow that when Parliament has drawn an act into the domain of criminal law, the right of the provincial legislatures to pass laws in regard to such an act necessarily ceases. Provincial legislatures may still, in

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of fine or imprisonment, for the good execution of their laws, with the provision of No. 27 of section 91, which gives the exclusive power to the federal parliament in a criminal matter." On appeal to the Supreme Court, the decision of the Court below was over-ruled, and it was held by the majority of the Court that the Quebec Act in question prohibiting theatrical performances on Sunday was criminal law, and, therefore, *ultra vires;* but it cannot be said that the judgments militate against acceptance of Archambault, J.'s, exposition of the matter, but rather they proceed on the ground that Sunday observance was matter of criminal law under the statute of Charles II. at the time English criminal law was received into Quebec: see *infra*, p. 606. The objection to what Archambault, J., says is, it is submitted with deference, that it cannot be said that there is, or, perhaps, can be, a well-defined class of wrongful acts constituting *mala in se.* And as to provincial legislatures being able sometimes to legislate in a different aspect respecting an act which the Dominion has already constituted a crime, see text. See, also, *supra*, pp. 322-4.

[24] *Supra*, pp. 320-332. *Cf.* also per Richards, C.J., in *Regina* v. *Boardman* (1871), 30 U. C. R. at p. 556, as to Dominion criminal law and provincial offences.

[25] *Supra*, p. 329.

[26] A writer in 7 C. L. J. at pp. 86-9, (1871), contended that the Dominion parliament has no jurisdiction to prohibit under penalty and imprisonment civil trespasses, as he contended it had done by an Act of 1869. But it is submitted Parliament can turn civil trespass of any kind into a criminal offence.

many instances, legislate against the same act in another aspect. It is by virtue of No. 15 of section 92, in connection especially with No. 13 (property and civil rights) and No. 16 (matters of a merely local or private nature in the province) that we get those provincial penal Acts which have sometimes been spoken of as 'provincial criminal law,'[27] and very often as 'police regulation.' This in *Huson* v. *Township of South Norwich,*[28] Taschereau, J., says: "There are a large number of subjects which are generally accepted as falling under the denomination of police regulations over which the provincial legislatures have control within their territorial limits, which yet may be legislated upon by the federal parliament for the Dominion at large. Take, for instance, the closing of stores and cessation of trade on Sundays. Parliament, I take it for granted, has the power to legislate on the subject for the Dominion; but until it does so, the provinces have, each for itself, the same power.'"[29] And Mr. Horace Davey, as he then was, in his learned and instructive argument before the Privy Council in the case of *Hodge* v. *the Queen,*[30] touches upon the same subject in a slightly different connection, in a manner worth repeating here. He says: "From one point of view I can understand that the regulation of liquor traffic may come under the head of trade and commerce, and would be within the compet-

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[27] *E.g.* per Rose, J., in *Regina* v. *Hart* (1891), 20 O. R. at pp. 612-4. No doubt an incorrect phrase. On the argument on the Lord's Day Act Case (*Attorney-General for Ontario* v. *Hamilton Street R. W. Co.*, [1903] A. C. 524), it appears from the *verbatim* report that when Counsel said: "There is a provincial criminal law and a Dominion criminal law," the Lord Chancellor observed: "I do not agree with that:" Marten, Meredith, Henderson, & White's report, p. 30. In *Russell* v. *The Queen* (1882), 7 App. Cas. 829, at p. 840, the Judicial Committee say: "It was argued by Mr. Benjamin that if the Act related to criminal law it was provincial criminal law," etc.

[28] (1895) 24 S. C. R. at p. 160.

[29] As to police power in Canada, and that the provinces do not possess it exclusively in "the wide meaning which the jurisprudence of the United States has given it," see per Sedgewick, J., in *In re Prohibitory Liquor Laws* (1895), 24 S. C. R.

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at p. 248. In the course of the argument on the Liquor Prohibition Appeal, 1895, members of the Judicial Committee found some fault with the term 'police regulation.' Thus:—

Lord Herschell: "Police regulation is a very vague phrase. I am quite aware that it was used in Hodge's case, but it only means something conducive to the good order of the Dominion. It has nothing to do with the police. Saying that licensed premises shall not be open within prohibited hours is not a 'police regulation.' The police have nothing to do with it except to see that the law is not broken, as in every other case."

The Lord Chancellor: "We have substituted the word 'police' for 'constable' and if you get the old common law word there is a thread of theory that ran through it which was the preservation of the peace."

Lord Davey: "If you look at the derivation of 'police,' I expect it means the maintenance of municipal order."

Lord Watson: "We are apt to use these expressions which really are not definitive of the thing enacted, but are descriptive of the executive body connected with the execution of the statute. It becomes a police matter, and we use the words 'police regulation' whenever it is entrusted to the police for enforcement. But that word does not define the nature of the enactment or the object of the legislature in passing it. Sanitary arrangements and that kind of thing are entirely for the benefit of the community."

Lord Herschell: "There is nothing about police in section 92 at all. It was used in Hodge's case. It was thought it pointed to a distinction which helped one. I confess you may call them 'police regulations,' but it does not help one with reference to other cases to call them 'police regulations:' Printed report of argument at pp. 232-3.

On the argument before the Supreme Court, Strong, C.J., had said:—"The superintendence of markets, roads, bridges, keeping order in public places, streets, and so on, is all police power." Transcript from shorthand notes of Nelson R. Butcher, at p. 68.

[30] Dom. Sess. Pap. 1884, Vol. 17 No. 30, p. 98.

ence of the Dominion parliament.[31] . . . I can imagine, on the other hand, and, in fact, my submission is, that police regulation with regard to the times of closing public houses with the object of preventing them becoming a resort for thieves and prostitutes and other bad characters, and with regard to obtaining public quiet, and matters of that kind,—in that point of view the regulation of the liquor traffic, if I may use the expression, is a matter of a purely local character, and a fit matter for the provincial legislature to deal with.'"[32] We shall now proceed to mention the decisions illustrative of this subject of provincial penal laws.

Provincial penal laws. Police or municipal regulations of the liquor traffic.—It will be well to commence with the judgment of the Privy Council in the case just referred to of *Hodge* v. *the Queen.*[33] There the Act under discussion was the Ontario Liquor License Act, 1877, which by sections 4 and 5 empowered license commissioners to make regulations as to the conditions and qualifications requisite to obtain tavern licenses for the retail of spirituous liquors within the municipalities of Ontario, and in their judgment their lordships say: "That Act is so far confined in its operation to municipalities in the province of Ontario, and is entirely local in its character and operation. Their lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns licensed for the sale of liquors retail. The subjects of legislation in the Ontario Act of 1877, sections 4 and 5, seem to come within the heads of Nos. 8, 15 and 16 of section 92 of the British North America Act." And so in the Liquor Prohibition Appeal, 1895,[34] the Judicial Committee say that it is certainly "not impossible that the vice of intemperance may prevail in particular localities within the province to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor, a matter of a merely local or private nature, and therefore, falling *prima facie* within No. 16 of section 92 of the British North America Act."[35] "In that state of things," they add—"It is conceded that the parliament of Canada could not imperatively enact a prohibitory law adapted and confined to the requirements of localities within the province, where prohibition was urgently needed."[36]

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[31] He then refers to *Russell* v. *The Queen* (1882), 7 App. Cas. 829; but in their judgment on the Liquor Prohibition Appeal 1895, [1896] A. C. 348, the Privy Council make it quite clear that it was under the general legislative power of Parliament to make laws for the peace, order and good government, of Canada on non-provincial subjects, and not as coming within the regulation of trade and commerce, that they held the Canada Temperance Act to be *intra vires* in *Russell* v. *The Queen.*

[32] See, also, *supra*, pp. 200-209.

[33] (1883) 9 App. Cas. 117.

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[34] *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A. C. 348. See as to this case *supra*, pp. 124; 203.

[35] As to a similar provincial power to prohibit the manufacture of intoxicating liquors,—"if it were shown that the manufacture was carried on under such circumstances and conditions as to make its prohibition a merely local matter in the province,' see S. C. [1896] A. C. at p. 371.

[36] See *supra*, pp. 203-4, where this case is further referred to.

So, again, in *Attorney-General of Manitoba* v. *Manitoba License Holders Association,*[37] the Privy Council have held the Liquor Act of Manitoba, 63-64 Vict. c. 22, which included divers prohibitions and restrictions affecting the importation, exportation, manufacture, keeping, sale, purchase, and use of intoxicating liquors, to be *intra vires,* upon the ground that the subject was, and had been dealt with, as a matter of a merely local nature in the province within the meaning of No. 16 of section 92.[38] "In legislating for the suppression of the liquor traffic," their lordships say in this case at p. 78, "The object in view is the abatement, or prevention, of a local evil, rather than the regulation of property and civil rights,—though, of course, no such legislation can be carried into effect without interfering more or less with property and civil rights in the province."[39]

In *Rex* v. *Riddell,*[40] Kelly, J., considered *Hodge* v. *The Queen, supra,* authority for holding *intra vires* an Ontario enactment that in a municipality in which a by-law under the Ontario Liquor License Act prohibiting the sale of intoxicating liquors by retail is in force, a person found upon a street, or in any public place, in an intoxicated condition owing to the drinking of liquor, shall be guilty of an offence against the Liquor License Act aforesaid.[41]

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[37] [1902] A. C. 73. Reversing the decision below: 13 Man. L. R. 239. *Cf. Keefe* v. *McLennan* (1876), 2 R. & C. at p. 11; *Ex parte Laveille* (1877), 2 Steph. Dig. at p. 446.

[38] As to the power of the Ontario legislature to prohibit the sale of liquors on vessels on the Great Lakes, see *Rex* v. *Meikleham* (1905), 11 O. L. R. 366.

[39] See this case of *Attorney-General of Manitoba* v. *Manitoba License Holders Association,* also referred to, *supra,* pp. 191; 204-5; 234; and in connection with it, see *City of Montreal* v. *Beauvais* (1909, 42 S. C. R. 211, referred to *infra,* p. 593; and *Ex parte O'Neill* (1905), R. J. Q. 28 S. C. 304. See, also, *Rex* v. *Carlisle* (1903), 6 O. L. R. 718; and *Rex* v. *Walsh* (1903), 5 O. L. R. 527.

[40] (1912) 4 Dom. L. R. 662.

Provincial penal laws (continued). Regulating selling of drugs.—In the same way, in *Bennett* v. *Pharmaceutical Association of the Province of Quebec,*[42] it was held by the Quebec Court of Queen's Bench (Appeal side) that the Quebec Pharmacy Act, 1875, so far as it required certain qualifications on the part of the persons exercising the business of selling drugs and medicines, was valid. In delivering judgment, Dorion, C.J., says (at p. 340): "The determining of the age or other qualifications required by those residing in the province of Quebec to manage their own business, or to exercise certain professions, or branches of business, attended with danger, or risk, for the public, are local subjects in the nature of internal police regulation; and in passing laws upon those subjects, even if those laws incidentally affect trade and commerce, it must be held that this incidental power is included in the right to deal with subjects specially placed under their control, the exercise of which cannot be considered to be unconstitutional.[43] And so, generally, *In re Slavin*

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[41] As to ordering the closing of shops during certain days or hours, see *infra*, pp. 593-4; as to Sunday observance laws and regulations, see *infra*, pp. 594-612.

[42] (1881) 1 Dor. Q. A. 336. And so *In re Girard* (1898) R. J. Q. 14 S. C. 237.

[43] See *supra*, pp. 180-9; 193.

and Village of Orillia,[44] Richards, C.J., refers to the words of McLean, J., in the License Cases,[45] as apposite to our own constitutional system, that, notwithstanding that the power of regulation of foreign commerce rests with Congress, and not with the States, still—" If a foreign article be injurious to the health, or morals, of the community, a State may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it; " adding, " such a regulation must be made in good faith, and have for its sole object the preservation of the health and morals of society."[46]

Provincial penal laws (continued). Assize of bread.—In *The King* v. *Kay*,[47] the Supreme Court of New Brunswick held that sub-section 5 of the City of Moncton Incorporation Act, 53 Vict. c. 60, s. 47, authorising the Council of the City of Moncton to make by-laws to regulate the assize of bread was not *ultra vires* of the local legislature, as such regulation could apply to the City of Moncton only. The by-law in question enacted that: ' Every loaf of bread made for sale, or offered, or exposed, for sale, in the City of Moncton shall have the initials of the name of the baker by whom it was manufactured stamped in plain and legible characters thereon, and also the figure, or figures, denoting its weight,' on pain of forfeiture and seizure of the loaves, and a penalty.

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[44] (1875) 36 U. C. R. at p. 173. The decision in this case upheld a municipal by-law wholly prohibiting the sale of spirituous liquors in shops and places other than houses of public entertainment, and, limiting the number of tavern licenses to nine, and the provincial Act under authority of which it was passed.

[45] 5 How. at p. 592.

[46] See *supra*, pp. 583-5.

[47] (1909) 39 N. B. 278. *Cf.* also *Re Bread Sales Act* (1911), 23 O. L. R. 238, referred to *supra*, p. 272.

Provincial penal laws (continued). Cheese and butter manufactories. — In *Regina* v. *Wason*,[48] the Ontario Court of Appeal held a provincial Act to provide against frauds in the supplying of milk to cheese and butter manufactories *intra vires*. Osler, J.A., in that case,[49] says: " What is the real character and scope of the Act? Does it operate to enlarge the borders of the criminal law as that expression is used in section 91, sub-section 27, of the British North America Act; or is it concerned primarily with property and civil rights, providing for its enforcement by fine and imprisonment, as may be lawfully done where the principal matter is within the class of subjects comprised in section 92?" And he, and all the judges, of the Court decided in favour of the latter alternative. But it is instructive to find that the Dominion having also passed an Act to provide against frauds in the supplying of milk to cheese factories, etc., (52 Vict. c. 43) very similar to the Ontario Act, it, too, was held to be *intra vires* in *Regina* v. *Stone*,[50] as a public criminal law passed in the interest of the general public, by the Ontario Common Pleas Divisional Court, Rose, J., observing, (at p. 49): " As has been pointed out in *Regina* v. *Wason,* the Act of the legislature differs in form from the Act of Parliament in that, under the former, the offence consists in doing certain things without notifying in writing the owner, or manager, of the cheese or butter manufactory. The Act in question forbids all persons doing the acts therein stated, and is in form similar to other Acts found upon the pages of the revised statutes of Canada creating crimes." And he cites as appropriate, the words of Maclennan, J.A., in *Regina* v. *Wason,*[51] as to the Dominion Adulteration Act of 1885, by which the sale of watered or skimmed milk was prohibited, where he says: "The Dominion Act is universal in its scope and application, and prohibits the forbidden acts by all persons whomsoever under all circumstances, and in all places, throughout the Dominion, while the provincial Act is confined to the dealings between these two particular kinds of manufacturers and their customers. The one has all the features of a public criminal law passed in the interest of the general public; the other is merely the regulation of the mode of carrying on a particular trade or business within the province, so far as to secure fair and honest dealing between the parties concerned."[52]

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[48] (1890) 17 O. A. R. 221.

[49] At pp. 239-40.

[50] (1892) 23 O. R. 46. See, also, *Regina* v. *Keefe* (1890) 1 Terr. L. R. 280; and *Kitchen* v. *Saville* (1897) 17 C. L. T. at p. 91.

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[51] 17 O. A. R. at p. 248.

[52] *Cf.* per Scott, J., in *Regina* v. *Fleming* (1895), 15 C. L. T. (N. W. T.) at p. 247. In a report of Nov. 2nd, 1895, on an Ontario Act for the prevention of fraud in the sale of fruit, Sir C. H. Tupper, as Minister of Justice, says:—"The main object of this chapter is to constitute offences, and establish penalties, in respect to fraud in the packing and sale of fruit, and it appears to relate rather to the subject of criminal law than to any matter of legislation which has been committed to the provinces." He recommends, however, that the matter be left to the Courts.

We may note, further, the words of Street, J., in *Regina* v. *Wason,*[53]: "There are good reasons for holding that the provincial legislatures could not by the mere act of passing a statute forbidding the doing of something already an offence, and affecting property and civil rights in the province, confer upon themselves jurisdiction to inflict a new punishment for the offence, and justify it upon the ground that they were merely enforcing their own statute. The foundation for the jurisdiction claimed would be defective, because of its dealing with matters of criminal law."

Provincial penal laws (continued). Trading stamps.—In *Montreal Trading Stamp Co.* v. *City of Halifax,*[54] a provincial Act amending the charter of the city of Halifax, by prohibiting the sale of trading stamp tickets or cards in Halifax, and the Trading Stamp Company, from doing business there, under penalty of nine months' imprisonment with hard labour, was held *intra vires* under No. 13 (' property and civil rights in the province ') or No. 16 (' matters of a merely local or private nature in the province ') of section 92 of the British North America Act, referring to *Regina* v. *Wason, supra,* and *Keefe* v. *McLennan.*[55] And the Ontario Court of Appeal, in answer to questions submitted, decided in favour of the constitutionality of like Ontario legislation, authorising municipal councils to pass by-laws 'for prohibiting the giving, selling, distributing, or receiving of trading stamps, coupons, or other similar devices, and for prohibiting the giving, selling, or dealing therewith by any person, firm, or corporation engaged in trade or business.'[56] On the other hand in *Wilder* v. *La Cité de Montreal,*[57] the Quebec Court of King's Bench (two judges dissenting) held the other way on the ground that a provincial legislature has no power to authorise municipalities to prohibit by by-law the exercise of any kind of commerce which is not in itself contrary either to good morals, nor to public order. *Sed quære.*[58]

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[53] 17 O. R. at p. 63.

[54] (1900) C. L. T. 20 Occ. N. 355: (apparently not reported elsewhere).

[55] (1876) 2 R. & C. at pp. 12-3.

Provincial penal laws (continued). Shop closing.—In *State* v. *Schuster,*[59] the Manitoba Court of King's Bench held *intra vires* under No. 16 of section 92, the Shops Regulation Act, which enabled a municipality to regulate and control the time of opening and closing shops within the municipality. It was argued unsuccessfully that to regulate the hours of closing shops was to regulate trade and commerce, and so within the Dominion jurisdiction exclusively. And so, in the *City of Montreal* v. *Beauvais,*[60] the Supreme Court held, reversing the decisions of the Courts below, that a provincial Act which authorised municipal councils to pass by-laws ordering that ' during the whole or any part, of the year, stores of one or more categories in the municipalities, be closed, and remain closed, every day, or any day, of the week, after the times and hours fixed . . . by the by-law,' was *intra vires* as coming within No. 16 of section 92 (' matters of a merely local or private nature in the province ') if not, also, within No. 13 of section 92 (' property and civil rights in the province ') ; and was not an invasion of No. 2 of section 91 (' the regulation of trade and commerce ').[61] The Court below had held that such provincial legislation was *ultra vires* unless strictly of the nature of police legislation, passed in the interest of public morals, and having for its sole object[62] the repression of abuses, or the maintenance of public order; and that a provincial legislature could not authorise a partial prohibition of trade by arbitrarily fixing the hours for closing from motives other than public order, as in this case.[63]

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[56] The judges gave no reasons for their answers, except Osler, J.A., who holds that the enactment concerns property and civil rights in the province, and that therefore the provincial legislature had jurisdiction to pass it. Their answers will be found set out in the report of the Quebec Case, *Wilder* v. *Cité de Quebec* (1904), R. J. Q. 25 S. C. at p. 137.

[57] (1905) R. J. Q. 14 K. B. 139, reversing the judgment below, R. J. Q. 26 S. C. 504.

[58] See *supra*, pp. 230-6 in connection with pp. 64-85; 184-198.

[59] (1904) 14 Man. 672. See, also, *Re McCoubrey* (1913), 9 Dom. L. R. 84.

[60] (1909) 42 S. C. R. 211, R. J. Q. 7 K. B. 420, 30 S. C. 427.

Provincial penal laws. Sunday observance.[64] —The course of judicial decisions as to provincial Sunday observance laws has been as follows. In 1895 the municipality of Vancouver, under the authority of the Vancouver Incorporation Act, 1886, passed a by-law 'for the prevention of sales . . . of any . . . personal property whatsoever, except . . . milk, drugs, or medicine . . . on Sunday'; and it was held in *Regina* v. *Petersky,*[65] that the provincial legislature having power to deal with the subject it was no objection that the provision was inconsistent with the Lord's Day Act, 29 Car. 11, c. 7. It was not, however, contended in that case that the statute authorising such a by-law was not within the powers of the legislature.

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[61] The Privy Council refused leave to appeal: (see 42 S. C. R. p. VII).

[62] See *supra*, pp. 210-218. And see *Re Fisher and Village of Carman* (1905), 16 Man. 560, *infra*, p. 600.

[63] As to general regulation of the liquor traffic, see *supra*, pp. 200-9.

[64] As to closing of shops generally during certain days and hours, see *supra*, pp. 593-4.

In 1898, in the *Queen* v. *Halifax Electric Tramway Company,*[66] a direct amendment by the provincial legislature of the Revised Statute of Nova Scotia (3rd Ser. c. 159) passed prior to Confederation, and entitled 'Of offences against religion; prohibiting servile labour (works of necessity and mercy excepted) on the Lord's Day,' was held to be *ultra vires,* on the ground that the statute thus sought to be amended was criminal law, while, at the same time, it was not denied that the provincial legislature would have power to deal with the subject by legislation coming under the head of property and civil rights. Thus Ritchie, J., says, at p. 476: "The Revised Statute of Nova Scotia, 3rd Ser., c. 159, being part of the criminal law, the local legislature of Nova Scotia had in my opinion, no power to alter or amend any of its sections, and any legislation purporting to have that effect is *ultra vires* the local legislature. I wish to be distinctly understood as giving no opinion as to whether the local legislature could, or could not, by any legislation, prevent the performance of servile, or other labour, on Sunday, but, I think, it cannot be done in the way attempted,—that is, by trying to amend the criminal law."

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[65] (1895) 4 B. C. 385. See, also, the prior case of *Poulin* v. *Corporation of Quebec* (1883) 9 S. C. R. 185, 7 Q. L. R. 337.

[66] (1898) 30 N. S. 469.

In 1900, in *Ex parte Green,*[67] the Supreme Court of New Brunswick upheld the provincial enactment 62 Vict. c. 11, whereby the sale of real or personal property, or the exercise of any worldly business or work, on Sunday, was prohibited, as within the authority of the legislature. Barker, J., after referring to the fact that the Dominion parliament had legislated against the unlawful obstruction of a clergyman in celebrating Divine service, and violence to him while officiating in such service, making these indictable offences, but had not legislated on the matters covered by the Act before the Court, says (p. 147): " There are wide differences in character between the offence of disturbing religious assemblies for worship, or interfering with clergymen in the discharge of their official duties, and the offence of buying a cigar, or going to a picnic on Sunday. Every person has an undoubted right to engage in the public worship of God according to his own particular method without being disturbed or hindered. That is a right common to all, and in all places. But what may be done on a Sunday without profaning it is a matter of opinion, and largely of sentiment—dependent upon a variety of circumstances and conditions—and one upon which well disposed people hold widely different views. But I am disposed to think that the Dominion parliament, in designedly refraining from legislating on this subject, did so because it was one which did not concern the general public, or affect them all to the same extent, or apply to them all in the same degree; but was rather to be regarded, and dealt with, as a police regulation, local in its character, and in its application, which required to be moulded so as to suit the requirements, and meet the conditions, of different localities, and different classes of population, and, in that way, ensure a reasonable cessation from labour and worldly business on Sunday, and confine its recreations within reasonable limits. Such, at all events, in my opinion, is the nature of legislation such as this, and I think that the provision under which this conviction took place was enacted by a competent legislative authority."

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[67] (1900) 35 N. B. 137. In this case the previous decisions are carefully collected. The case is also reported in 4 Can. Crim. Cas. 182, where the judgment of Barker, J., as reported in 35 N. B. at pp. 144-152, is, with one short passage omitted, attributed to Tuck, C.J., and stated to have been delivered by him as the judgment of the Court, and the judgment attributed to Tuck, C.J., in 35 N. B., at pp. 140-143 is altogether omitted.

This brings us to the Privy Council decision in *Attorney-General for Ontario* v. *Hamilton Street R. W. Co.*,[68] already referred to.[69] There their lordships held, on question of its validity referred by the Lieutenant-Governor of the province to the Court of Appeal for Ontario, which came before them on appeal from that Court, that the Ontario Act to prevent the profanation of the Lord's Day, R. S. O. 1897, c. 246, was "treated as a whole," *ultra vires* as legislation upon criminal law, which they held, "in its widest sense," was reserved to the exclusive legislative authority of the Dominion parliament; and that "an infraction of the Act, which in its original form, without the amendment afterwards introduced,[70] was in operation at the time of Confederation, is an offence against criminal law."[71] The judgment is extremely short, perhaps an indirect result of "the very protracted argument" to which their lordships had had to listen; and the above statement gives its full effect. The two sections of the Act material to notice for our present purpose were sections 1 and 9. These sections enacted:—

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[68] [1903] A. C. 524. Not reported below.

[69] *Supra*, p. 321.

'1. It is not lawful for any merchant, tradesman, farmer, artificer, mechanic, workman, labourer, or other person whosoever, on the Lord's Day, to sell or publicly show forth, or expose, or offer for sale, or to purchase, any goods, chattels, or other personal property, or any real estate whatsoever, or to do, or exercise, any worldly labour, business, or work of his ordinary calling (conveying travellers or (His) Majesty's mail, by land or by water, selling drugs and medicines, and other works of necessity and works of charity only excepted.)'

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[70] See *supra*, p. 321, n.

[71] *In Rex* v. *Yaldon* (1908) 17 O. A. R. 179, the Court held, as a consequence of this decision of the Privy Council that C. S. U. C. c. 104, s. 3, which provides that—'It is not lawful for any person on that day' (*i.e.* Sunday) 'to play at skittles, ball, football, rackets, or any other noisy game, or to gamble with dice, or otherwise, or to run races on foot, or on horses, or in carriages, or in vehicles of any sort'—continues in force in Ontario by virtue of s. 129 of the British North America Act (see *supra* pp. 161-3) not having been repealed, abolished, or altered by the parliament of Canada.

'9. All sales and purchases, and all contracts and agreements for sale or purchase, of any real or personal property whatsoever made by any person or persons on the Lord's Day shall be utterly null and void.'

Regarding the Act "as a whole" we see that, besides the provisions above mentioned, it prohibits on the Lord's Day holding or attending public political meetings, allowing or permitting tippling in taverns, or houses of public entertainment, revelling, being intoxicated in public, brawling or using profane language in the public streets or open air so as to create any riot or disturbance, or annoyance to (His) Majesty's peaceful subjects, playing noisy games, gambling, or running races, hunting and shooting, except in defence of one's property from any wolf or other ravenous beast, or bird of prey, fishing, bathing in exposed situations, or engaging in Sunday pleasure excursions by steamboat or railway. For the rest, the Act imposes penalties for infringement of its provisions, and regulates the procedure to enforce the same and the application thereof.

The reported decisions which have followed this judgment of the Privy Council have now to be mentioned, but we may point out before doing so, that the difficulty in applying the Privy

Council decision just referred to, lies in the fact that their lordships do not amplify or explain, what they mean by the expression " treated as a whole," when they say that the Ontario Act then before them " treated as a whole " is legislation upon criminal law.

In *Re Fisher* v. *Village of Carman,*[72] it was held that a municipal by-law passed under the general powers of the Municipal Act and ordering pool rooms and billiard rooms to be closed during Sundays, and from ten p.m. to six a.m. on other days, was not *ultra vires,* though it may have been intended as a means of enforcing Sunday observance to that extent. In so holding the Manitoba Court of King's Bench simply affirmed, without stated reasons, the judgment of Dubuc, C.J., who after saying that the Privy Council judgment in *Attorney-General for Ontario* v. *Hamilton Street R. W. Co.*[72a] had been quoted against the by-law, stated that he did not consider it incumbent on him on that application, to decide, in the absence of the Attorney-General, that the by-law should be held *ultra vires* under that decision, in view of the fact that neither the by-law, nor the Municipal Act, made any express reference to Lord's Day observance, whatever the intendment might have been: that the reasons which induced the Municipal Council to impose such conditions on the licensees of pool rooms, and billiard rooms, might be surmised; but that that was not sufficient ground for declaring that the by-law was bad and should be quashed, when there was nothing on its face expressing or indicating what the reason might be; and that taking this view of the case, he was not prepared to hold the by-law *ultra vires.*

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[72] (1905) 16 Man. 560.

[72a] *Supra,* pp. 597-9.

The words "treated as a whole" in the Privy Council judgment are emphasized in the next recorded decision, namely that in the Quebec case of *Couture* v. *Panos.*[73] There it was held, that a Quebec Statute of 1907 prohibiting, with certain exceptions, the sale of goods, wares, and merchandise, during Sunday, and providing that 'no person shall on Sunday, for gain, except in cases of necessity or urgency, do any industrial work, or pursue any business or calling, or act or organize any theatrical performance,'—was *intra vires,* and "to be classed as a police or a municipal regulation, and not as a matter essentially appertaining to the criminal law." Hutchinson, J., delivering judgment, says (p. 564): "Both the federal parliament and provincial legislature have legislated in regard to this matter of Sunday observance. The question, therefore, is—Was the field clear for the provincial legislature of this province to legislate to the limited extent it did on February 28th, 1907, the day before the Dominion Act came into force?[73a] On referring to the Hansard debates in Parliament, (Sess. 1906, Vol. 3, p. 5622 *et seq.*) it will be seen that the object of the legislation by the federal Parliament in 1906, was by reason of the Supreme Court,[74] as well as the Privy Council,[75] having declared that the Act of the Ontario legislature, or one similar in its terms to it, regarding Sunday observance—a very comprehensive Act,—was " treated as a whole "*ultra vires* of the provincial legislature, and it was considered desirable that there should be a uniform legislation throughout the whole of the Dominion of Canada, respecting this matter of Sunday observance. But it was generally admitted by lawyers on both sides of the House, that the provincial legislatures could legislate to some extent in regard to Sunday observance." He then refers to *Ex parte Green,*[76] and proceeds: " Therefore to use the language of one of their lordships of the Privy Council, we repeat was " the field clear " for the provincial legislature of Quebec to pass the Act, 7 Edw. VII. c. 42, above referred to, under which Act it seems evident that the present action was taken? On referring to the Dominion Act of 1906, it will be seen that in every important clause of this Act, special reservation is made in favour of the provincial Acts. The language employed is —' It shall not be lawful for any person on the Lord's Day, etc.[77] except as provided herein, or in any provincial Act or law now or hereafter in force.' And then, in section 16 of this Dominion Act, under the heading ' Procedure,' it is provided that ' nothing herein shall be construed to repeal, or in any way, affect any provisions of any Act or law relating in any way to the observance of the Lord's Day in force in any province of Canada when this Act comes into force.' Here is an express declaration that not only shall all provincial laws regarding this matter remain in force, but any new law that the provincial legislature may pass before March 1st, 1907, shall remain in force. The Dominion parliament not only yields a clear field to the provincial legislature, but impliedly invites that legislature to occupy it, if such legislature wishes to do so; and in view of this legislation, the Quebec local Act was no doubt passed. Under these circumstances, can it be contended that this Act is now *ultra vires* of the legislature? I cannot think so."

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[73] (1908) R. J. Q. 17 K. B. (Crown Side) 560, 564.

[73a] The Dominion Act referred to is R. S. C. 1906, c. 153.

[74] See *supra,* p. 322, n.

[75] See *supra,* pp. 597-9.

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[76] See *supra*, p. 596.

[77] The Dominion Act referred to provides by section 5 that ' it shall not be lawful for any person on the Lord's Day to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or to carry on, or transact, any business of his ordinary calling,' etc.

Then we get another Quebec case, which, if it were not for the decision of the majority of the judges in the recent case of *Ouimet* v. *Bazin,* presently to be noticed, might be thought to state the true legal distinction. This is *Tremblay* v. *Cité de Quebec,*[78] in which the Court of Revision of Quebec, held that a Quebec municipal regulation, enacted in 1909, which prescribed under penalties, the closing of places of amusement on Sunday, was within certain provisions of the Act of incorporation of Quebec, passed by the parliament of the old province of Canada, under which the Council was empowered to make regulations for the good order, peace, security, morality and local government of the city; and that this legislation was still in force, not having been revoked; and that the Dominion Lord's Day Act of 1906, above referred to,[79] did not have the effect of revoking, or affecting, the said Act of incorporation, and that the regulations authorised by it, adopted afterwards, were valid and *intra vires*. The Court held that the regulations in question for the observance of Sunday were not to be classed with criminal law, and formed no part of the criminal law properly so called; but were police regulations which the Court defines as regulations suggested by the special circumstances of particular localities to promote the welfare and benefit of the public, and the material, intellectual, and moral interests of the inhabitants; and they distinguished *Attorney-General for Ontario* v. *Hamilton St. R. W. Co.*[80] on the ground that the Privy Council was not there concerned with a police law, or a police regulation, nor with a law, or regulation, made for a particular city or municipality, but with a general law for the whole province of Ontario,[81] decreeing the general prohibition of all forms of work whatsoever universally on Sunday in connection with steamships, or other ships, railways, canals, telegraphs, and other works, and undertakings; and they cite the words of the Privy Council, that the statute " as a whole " was beyond the competency of the Ontario legislature. " But this statute," says the

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[78] (1910) R. J. Q. 37 S. C. 375, 38 S. C. 82.

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[79] R. S. C. 1906, c. 153.

[80] [1903] A. C. 534. *Supra*, p. 597.

[81] At the same time there is no doubt that a provincial legislature can enact for the whole province what it can enact for a locality in the province, so that this feature of the Ontario Lord's Day Act dealt with in the Privy Council decision referred to, cannot be relied upon, in itself, as explaining that decision. See *supra*, pp. 140-3.

Quebec Court, " was not a police law, nor one for the internal government of a municipality, but was a statute which affected, restrained, and limited rights relating to subjects within the absolute jurisdiction of the Dominion parliament, such as the navigation of ships, the operation of railways, canals, and telegraphs, and other works. Besides which this decision was given three days before the (Dominion) Lord's Day Act, 1906, when the Dominion parliament had not yet enacted in a formal way, as they did later, this law concerning the observance of Sunday, in which it has said that all the provincial Acts, charters, and municipal regulations concerning morality, order, and the public peace, and, therefore, all laws relating directly or indirectly to the observance of Sunday shall remain in force."[82]

In *Fallis* v. *Dalthaser,*[83] the Supreme Court of Alberta held the North-West Territories Ordinance, 1898, which declared void all sales and purchases, as well as contracts and agreements for the sale or purchase, of real or personal property when made on Sunday, *intra vires* of the legislature of Alberta, and that " its effect is preserved " by the Dominion Lord's Day Act, R. S. C. 1906, c. 153, s. 16.

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[82] See R. S. C. 1906, c. 153, secs. 5, 8, 16. The reference to provincial Acts in these sections, however, is to provincial laws 'in force,' they, therefore, do not appear to give validity to *ultra vires* provincial laws, although it is submitted, the Dominion parliament was quite competent to do so, legislating by reference. See *supra*, pp. 71-3; and per Idington, J., in *Ouimet* v. *Bazin* (1912) 46 S. C. R. at p. 520.

[83] (1912) 4 Dom. L. R. 705.

This brings us to the recent Supreme Court decision in *Ouimet* v. *Bazin*,[84] where the majority of the judges, Fitzpatrick, C.J. and Duff and Anglin, JJ., have held, basing themselves on the Privy Council decision in *Attorney-General of Ontario* v. *Hamilton Street R. W. Co.*,[84a] that Quebec legislation prohibiting under penalties the giving of theatrical performances on Sunday for gain, except in case of necessity or urgency, was void as being criminal legislation. Fitzpatrick, C.J., appears to read that decision as importing that no legislation for " the observance of Sunday " is within provincial jurisdiction, the same being already the subject of criminal legislation, the Sunday Observance Act, 29 Car. II., c. 7, being part of the criminal law of England declared to be in force by the Quebec Act, 14 Geo. III., c. 83. Anglin, J., takes a similar view. Fitzpatrick, C.J. (p. 506) regards the Privy Council as laying down this test as to what is ' criminal law ' within the meaning of No. 27 of section 91, that " it would include every such law as purports to deal with public wrongs, that is to say, with offences against Society, rather than against the private citizen." And says: " Apply this test to the section we are now considering; assuming a breach of the prohibition, what private right could possibly be affected, and for what conceivable violation of the section would a private citizen have recourse; " adding (p. 507): " In the Hamilton Street Railway case their lordships hold, impliedly at least, that Christianity is part of the Common law of the realm; that the observance of the Sabbath is a religious duty; and that a law which forbids any interference with that observance is, in its nature, criminal."

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[84] (1912) 46 S. C. R. 502.

[84a] *Supra*, pp. 597-9.

Anglin, J., (pp. 529-9), observes that a person who kept open shop on Sunday would appear to have been indictable at Common law as 'a common Sabbath-breaker and prophaner of the Lord's Day commonly called Sunday,' citing 2 Chitty's Criminal Law, 2nd ed., p. 20; but he adds that he "abstains from attempting to enunciate a criterion for the determination of the broader question, whether a prohibitive enactment, carrying penal sanctions for its infraction, should be regarded as so far partaking of the nature of criminal law that it is within the exclusive legislative power of the federal Parliament." It is well to specially note his words (at p. 528) when he says: "I do not regard the decision of the Judicial Committee as depending on the fact that the Upper Canada Lord's Day Act, (C. S. U. C. 1859, c. 104), had been originally enacted by a legislature clothed with authority to pass criminal laws. Neither can I accede to an argument, which involves the view that legislation held to be criminal in one province of Canada may be regarded as something different in another province, or that the phrase 'the criminal law' used in section 91, sub-section 27, of the Imperial British North America Act, may have a meaning different from that which would be attached to it in other legislation of the Imperial parliament.[85] Lord Chancellor

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[85] See *supra*, pp. 159-160; 324-5; 580, n.

Halsbury says that it is "the criminal law in its widest sense" that is there reserved to the Dominion parliament." He concludes, (pp. 529-530), by saying that to prevent profanation of the Sabbath was clearly the object of the enactment before the Court, and "it is such legislation that their lordships of the Judicial Committee, as I understand their judgment, have held to be criminal law, and as such beyond the competency of a provincial legislature." Duff, J., concurs with Fitzpatrick, C.J. and Anglin, J., in holding that the Privy Council decision compelled the Court to hold the enactment in question *ultra vires* inasmuch as it "in effect treats the acts prohibited as constituting a profanation of the Christian institution of the Lord's Day, and to declare them punishable as such;"[86] but he takes pains to add, (p. 525): "It is, perhaps, needless to say that it does not follow from this that the whole subject of the regulation of the conduct of people on the first day of the week is exclusively committed to the Dominion parliament. It is not at all necessary in this case to express any opinion upon the question, and I wish to reserve the question in the fullest degree of how far regulations enacted by a provincial legislature affecting the conduct of people on Sunday, but enacted solely with a view to promote some object having no relation to the religious character of the day, would constitute an invasion of the jurisdiction reserved to the Dominion parliament." The majority of the Court then would appear to hold, on the authority of the Privy Council decision in *Attorney-General of Ontario* v. *Hamilton Street R. W. Co., supra,* as interpreted by them, that the question whether Sunday legislation is exclusively for the Dominion parliament or not, depends on the point of view of the legislator in legislating. Legislation framed from a Christian point of view in order to prevent irreligious desecration of the Lord's Day is for the Dominion parliament, and not for the provincial legislatures.

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[86] The Ontario Act in question is intituled 'An Act to prevent the profanation of the Lord's Day.'

If this is a correct statement of their lordships' view, it, of course, holds the field as the final pronouncement on the subject, in the absence of any explanation by the Judicial Committee of exactly what the *ratio decidendi* of their judgment in *Attorney-General of Ontario* v. *Hamilton Street R. W. Co.*,[87] is.

Idington, J., however, and Brodeur, J., dissented from the other judges, Idington, J., referring, (p. 518), to the words "treated as a whole," in the Privy Council judgment, says:—"In order to estimate properly the effect of the expression 'treated as a whole' in the above opinion, we must look at the remaining sections of the Ontario Act. Section 2 deals with political meetings, tippling, brawling, etc.; section 3, with games and amusements; section 4 with hunting; section 5 with fishing; section 6 with bathing in exposed situations, and each of these things, if done on Sunday, is declared to be unlawful. Sections 7 and 8 prohibit steamboat and railway excursions for hire, and the running of street cars on Sunday. Condensing them thus each offence may not be accurately described, but I think they are sufficiently so to show the nature of the Act, when I add that there were penal clauses and prosecutions therefor provided in the Act." The Act, he says, (p. 519), "reaches to almost every activity of mankind in their daily avocations. . . So comprehensive is the language in question here that it runs athwart the courses of business and transactions of men which they are only enabled to do by virtue of Dominion legislation. . . . The Act discriminates not, and covers the case of the banker, and the railway manager, or superintendent, and all under him or them, as well as the case of the corner grocer or village blacksmith." Then treating the provision of the Quebec Act in question prohibiting theatrical performances on Sunday separately from the provisions of the Act as a whole, as he holds himself, on the wording of the Act, entitled to do, he says (p. 521): "I think the giving on Sunday of theatrical performances or excursions of the kind described" (*i.e.* where intoxicating liquors are sold) "may be well prohibited by provincial legislation. The prohibition of such a specific act as either might well find a precedent in the many cases recognising the right of a province to make such mere police regulations as the social habits and conditions existing in that province may require." He then points out that the contention of counsel that these precedents rest upon the licensing power is unsustainable, and that the powers assigned by Nos. 8, 13, and 16 of section 92 of the British North America Act have in turn had to be relied upon, and proceeds (p. 523): " True this is not a municipal regulation, but suppose the legislature chose to assign the power to city municipalities to make such regulation respecting theatrical exhibitions as that here in question, can it be said it would then be legislating *ultra vires*? We, at least, in *City of Montreal* v. *Beauvais,*[88] have gone quite as far in upholding a by-law enabled by the legislature for closing shops after certain hours. I may add that leave to appeal from our decision in that case was refused by the Judicial Committee. The remarks of Lord Davey in *City of Toronto* v. *Virgo,*[89] point in the direction of what I am trying to reach in that regard."[90]

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[87] [1903] A. C. 524.

Brodeur, J., also, dissents from the majority of the Court in this case of *Ouimet* v. *Bazin,* and says (p. 535): " If the provinces can close the bars on Sunday I cannot understand why in the exercise of their powers to make police laws, they would not have the right to close the theatres on Sunday. The provincial legislation in question in this case, after all, only amounts to a police regulation."

In the Court below in this case of *Ouimet* v. *Bazin,*[91] the majority of the Court held the legislation in question valid as a simple police measure, and that it was not criminal law properly so called.[92] Judgment was delivered by Archambault, J., who reviews the decisions which recognize that measures of simple police are within the competence of the provincial legislature, and says, at p. 417, (if a translation may be ventured on): "It has never been pretended, so far as I know, that every law concerning the observance of Sunday is matter for federal legislation exclusively. The question of the observance of Sunday is not mentioned in the Act of 1867 in the enumeration of matters which pertain either to the federal Parliament, or the provincial legislatures." He considers *Attorney-General of Ontario* v. *Hamilton Street R. W. Co.*,[93] entirely distinguishable inasmuch as the Ontario law there in question was unconstitutional because it abrogated and replaced an ante-Confederation law which had declared that certain Acts if done on Sunday constituted criminal offences.

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[88] (1909) 42 S. C. R. 211. *Supra,* p. 593.

[89] [1896] A. C. 88, at p. 93.

[90] The passage referred to is where the Privy Council say that there is a marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it.

[91] (1910) R. J. Q. 20 K. B. 417. *Cf. McLaughlin* v. *Recorder's Court* (1902) 4 Q. P. R. 304.

Such, then, is the somewhat unsatisfactory state of the authorities upon the subject of Sunday-observance legislation.

Provincial penal laws (continued). Nuisances.—In *Pillow* v. *City of Montreal*,[94] the question was whether a Quebec Act, prohibiting the use of factory chimneys 'sending forth smoke in such quantities as to be a nuisance,' was *ultra*

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[92] They, erroneously as the authorities seem to show, (see *supra*, pp. 426-433), placed it under the category of 'municipal institutions,' No. 8 of section 92.

[93] [1903] A. C. 524; *supra*, pp. 321, 597.

[94] (1885) M. L. R. 1 Q. B. 401.

vires, and the Court of Queen's Bench at Montreal held that it was not, for that the offence aimed at, though designated a nuisance, fell short of the criminal misdemeanour of common nuisance, and the Act concerned police regulation incidental to municipal institutions. But, at p. 409, Cross, J., observed: "Perhaps the question could be met in a broader sense, that is, admitting that the act of permitting or causing a chimney to send forth smoke in such quantity as to be a nuisance amounts to the misdemeanour which is a common nuisance by the criminal law of the land, would the provincial legislature be prohibited from taking measures, not to try whether a common nuisance had been committed for which the offender would be amenable by criminal prosecution, but, when a certain state of facts occurred, which might, or might not, amount to such common nuisance, would that legislature not be entitled, always acting within their powers, to provide that such penalties would be a consequence of that state of facts? . . . It is unnecessary to rule this point for the decision of the present case. . . . I may, however, remark that the case is fairly put by Judge Torrance in the case of *Ex parte Pillow,*[95] when he holds that the power of the Dominion parliament to enact a general law of nuisance as incident to its right to legislate as to public wrongs, is not incompatible with a right in the provincial legislature to authorize a municipal corporation to pass a by-law against nuisances hurtful to public health, as incidental to municipal institutions."

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[95] (1883) 6 L. N. 209.

Provincial penal laws (continued). Lotteries and gambling.—In *L'Association St. Jean Baptiste* v. *Brault,*[96] the Supreme Court held in accordance with obvious principle,[97] that provincial legislatures have no jurisdiction to permit the operation of lotteries forbidden by the criminal statutes of Canada.

Girouard, J., however, dissented on the ground that, in his view, lotteries were not prohibited as crimes properly so called, in Canada, until the Criminal Code of 1892, and the contracts whose legality was called in question, and which rested on a provincial statute passed in 1890, were signed before the Criminal Code, 1892, came into force.[98]

In *Regina* v. *Shaw,*[99] the Manitoba Queen's Bench held that keeping a gambling house is an offence against the general criminal law, it being an offence at common law to keep a common gaming house (which is the same as a gambling house, per Taylor, C.J., at p. 523), and that consequently it can be dealt with only by the parliament of Canada, and cannot be made an offence by a provincial Act, or by a municipal by-law passed under the authority of such an Act. But Dubuc, J., expresses the view, p. 528), that, although keeping a gambling house is undoubtedly a criminal offence, yet such houses might also be regarded as centres of disorder and immorality in the community which municipal corporations have a right and even a duty to suppress.

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[96] (1900) 30 S. C. R. 598.

[97] *Supra*, pp. 326-9.

[98] This decision nullifies that of *Societé des Ecoles Gratuites* v. *Cité de Montreal*, (1901) R. J. Q. 19 S. C. 148, as to provincial legislatures having power to authorise licensing lottery companies, where, however, the point as to lotteries being criminal does not seem to have been taken. In *Regina* v. *Harper* (1892), R. J. Q. 1 S. C. 333, Dugas, J., held that R. S. C. 1886, c. 159, being an Act respecting lotteries, betting, and pool selling, was *intra vires* (repealed by Criminal Code 1892, s. 981 & Schedule 2. But see now R. S. C. 1906, c. 146, s. 236). But he would seem to have held, nevertheless, that if lotteries had not been made criminal by the Dominion parliament, as, in fact, they had, the provincial legislature might legalize and permit them under No. 13 of section 92 of the British North America Act "as one of the means of acquiring property or something of that sort"; or under No. 16 of that section as a merely private or local matter in the province, but that such provincial enactments could have no effect in view of the Dominion Act absolutely forbidding lotteries. See also, *Pigeon* v. *Mainville* (1893) 17 L. N. at p. 72, where Desnoyers, J. P. C., concurs in the decision of Dugas, J., in *Regina* v. *Harper*, *supra*.

[99] (1891) 7 M. R. 518.

Provincial penal laws (continued). Injury to property.—In *McCaffrey* v. *Hall,*[100] the Quebec Superior Court held *intra vires* a provincial Act which authorised certain persons to erect piers and booths in the river Nicolet, and by section 6 provided that any person wilfully or maliciously cutting, breaking, or destroying any part of such piers or booths should be liable to be prosecuted for all damages so done, and, on conviction, be liable for all costs and damages, and in default of payment, or giving sufficient security, to imprisonment. The Court, however, made no special reference to section 6; and in his report, as Minister of Justice, of December 24th, 1894, on the Nova Scotia Acts of that year, Sir C. H. Tupper says,[101]: " The subject of malicious injury to property appertains to criminal law, and has been so dealt with under the Criminal Code. It is, therefore, beyond the power of the local legislature to constitute the malicious injury of property, either general or as regards a particular class of property, an offence, or to declare what shall be the punishment of such an offence." He recommends, however, that the matter be left to the Courts to deal with. And in a report of October 10th, 1894,[102] on the Manitoba Acts of that year, Sir John Thompson, as Minister of Justice, takes similar ground on the subject.

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[100] (1891) 35 L. C. J. 38.

[101] Hodgins' Prov. Legisl. 1867-1895, at p. 643.

Provincial penal laws (continued). Game laws.—*In Queen* v. *Robertson,*[103] the Manitoba Court of Queen's Bench held *intra vires,* under No. 16 of section 92 of the British North America Act, a provincial statute regulating the killing and possession of game at certain seasons of the year. Killam, J., points out, (at pp. 621-2), that, on the authorities which he refers to, a law is considered to be 'local' within the meaning of section 92 although having operation throughout the whole of the province, and although the subject with which it deals may be an important subject in other provinces also.[104] In a report, however, of March 21st, 1891,[105] Sir John Thompson, as Minister of Justice, expresses doubt as to whether such an Act is *intra vires* of the legislature of Manitoba where " all the lands were the property of Canada, and the ungranted lands are still the property of Canada;"[106] and he specially questions the validity of a provision that no one not domiciled in the province should take, or kill, any of the animals mentioned in the Act without license from the provincial Minister of Agriculture. In another report of the same date, in reference to a British Columbia Act to amend the Game Protection Act, which forbade the exportation out of the province of any animals or birds mentioned in the Game Protection Act in their raw state, the same Minister inclines to the opinion that 'the legislation operates directly as a restriction on trade and commerce, and the Dominion parliament alone, under its general powers of legislation, and under its particular powers in connection with the regulation of trade and commerce, may declare what goods may or may not be, exported from Canada."[107] But in *Regina* v. *Boscowitz*,[108] such an Act was held *intra vires* of the province, the Dominion power over trade and commerce not preventing "the legislature prohibiting export as incidental to, and as carrying out, the general scheme of game protection in the province."[109]

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[102] *Ibid.* at p. 994.

[103] (1886) 3 Man. 613.

[104] See *supra*, pp. 140-3.

[105] Hodgins Prov. Legisl. 1867-1795 at pp. 929-30.

In a report of June 6th, 1901, however,—the acting-Minister of Justice says with reference to another Manitoba Act respecting the protection of game which prohibited exportation out of the province of any of the animals or birds mentioned in the Act, except under special permit: "The predecessors in office of the undersigned have formerly called attention to similar provisions of other provincial Acts, objecting that a provincial legislature had no authority to prohibit exportation from the province. Subject to this objection, which the under-signed reiterates, he considers that this statute may be left to its operation.[110]

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[106] See as to this, however, *infra*, p. 708, n.

[107] Hodgins' Prov. Legisl. 1867-1895 at p. 1121.

[108] (1895) 4 B. C. 132.

[109] And see *supra*. pp. 230-6.

Provincial penal laws. Prohibiting Contracts by unregistered companies. — In *Rex* v. *Pierce,*[111] it was held that a provincial Act prohibiting under penalties the making of such contracts as loan companies enter into by corporations not duly registered under the Act in that regard was *intra vires* and did not deal with criminal law.

Provincial penal laws. Procedure. Evidence. —As already stated, provincial legislatures alone have power to regulate the procedure under such penal laws as we have been considering.[112] As an offence under such provincial Acts is not a crime within the proper meaning of No. 27 of section 91 of the British North America Act, so neither is the procedure applicable to the prosecution of such an offence 'criminal' procedure within the meaning of that clause.[113] And if this is correct on the authorities as they now stand, it would seem that the decision of Harrison, C.J., in *Regina* v. *Roddy*,[114] must be considered overruled, where he draws the curious distinction that, although a provincial law prohibiting the sale of spirituous liquors on Sunday, and punishing by fine or imprisonment, may not be a criminal law within No. 27 of section 91, but a perfectly good and valid law under No. 15 of section 92, yet the provincial legislature cannot enact that a man charged with an offence under it shall be a compellable witness, on the ground that the provincial legislatures have no power "directly or indirectly of destroying the general rules of evidence appertaining to criminal procedure, or quasi-criminal procedure throughout the Dominion, as for example, by passing an Act subjecting a man to testify against himself in cases where the charge against him is in substance a charge of crime." They had, he held, no power "to alter well-understood rules of evidence made for the protection of persons substantially accused of crime;" and for persons authorised to sell spirituous liquor to make sale thereof on Sunday, contrary to the provisions of the provincial

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[110] Prov. Legisl., 1899-1900, p. 85. It does not seem clear that provincial legislatures having—as they undoubtedly have—exclusive jurisdiction over property in the province, cannot restrain the export of any such property out of the province.

[111] (1904) 9 O. L. R. 374.

[112] *Supra*, pp. 331-2. And so *Pope* v. *Griffith* (1872), 16 L. C. J. 169, 17 L. C. J. 302; *Ex parte Duncan* (1872), 16 L. C. J. 188; *Coté* v. *Chauveau* (1880), 7 Q. L. R. 258; per Hagarty, C.J., in *Regina* v. *Wason* (1890) 17 O. A. R. at p. 232; per Maclennan, J. A., S. C. 17 O. A. R. at p. 251; *Regina* v. *Frawley*, (1882) 7 O. A. R. at p. 269. See also *Regina* v. *Boardman* (1871) 30 U. C. R. 553, esp. at p. 556.

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[113] So held in *McMurrer* v. *Jenkins* (1907) 3 E. L. R. 149 (P. E. I.). But see now *In re McNutt* (1912) 47 S. C. R. 259, noted *infra*, p. 622, n.

[114] (1877) 41 U. C. R. 291.

Act in that behalf, was a crime "in the broad sense of that word."[115]

And that this can no longer be accepted as good law would seem to be indicated by the recent case of *Weiser* v. *Heintzman* (No. 2),[116] where the Dominion parliament having provided by 56 Vict. c. 31, s. 5, that no person shall be excused from answering any question on the ground that the answer may tend to criminate him, Boyd, C., held that this enactment "by necessary constitutional limitations, as well as by express declaration, applies only to proceedings respecting which the parliament of Canada has jurisdiction,"[117] and that it did not apply to questions asked a defendant on an examination for discovery in an action for libel and slander, to which, on the other hand, the Ontario statute as to evidence was applicable, which, while permitting the examination of parties, provided that nothing therein contained should render any person compellable to answer any question tending to criminate himself. And so in the previous case of *Regina* v. *Bittle*,[118] where many cases and *dicta* were cited, it was held *ultra vires* of the Dominion parliament to enact, as they had done by R. S. C. 1886, c. 106, secs. 114, 120, that on the trial of any proceeding, matter or question, under any Act in force in any province respecting the issue of licenses for the sale of spirituous liquors, the defendant should be competent to give evidence; and in a proceeding under the Ontario Liquor License Act, R. S. O. 1887, c. 194, the defendant was held not to be a competent witness. It seems, however, somewhat strange that R. S. O. 1887, c. 61, s. 9, was held not to apply on the ground that that only made the defendant a competent witness on the trial of any matter 'not being a crime.'[119] This, however, was in accord with the decision in *Regina* v. *Hart*,[120] that an offence under a provincial penal Act, though certainly it is not a crime within No. 27 of section 91 of the British North America Act, is to be considered a crime for the purpose of the interpretation of such statutory provisions as the Ontario one just referred to. And so it was there held that, notwithstanding R. S. O. 1887, c. 61, s. 9, the defendant was not either a compellable, or a competent, witness on the trial of an offence against a city by-law in the erection of a wooden building within the fire limits.[121] And in *Regina* v. *Bittle,* above referred to,[122] MacMahon, J., seems to imply that if the Canada Temperance Act had made an offence under the Ontario License law a crime, then the procedure respecting the admissibility of the evidence of a defendant would be controlled by section 114 above referred to. With deference, however, it is submitted that what procedure governed would depend upon whether the charge was laid under the Dominion or the provincial statute, even though the Dominion parliament had made the infraction of a provincial Act a crime:[123]

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[115] 41 U. C. R. at pp. 296, 302.

[116] (1893) 15 O. P. R. 407.

[117] In *Regina* v. *Fox* (1899) 18 O. P. R. 343, it was held that an action for a penalty under 60-61 Vict. c. 11 D. restricting the importation and employment of aliens, is one to which the Canada Evidence Act, 56 Vict. c. 31, applies. A subsidiary question of a criminal character may arise in a civil action as when one claimed the ownership of money found in a common gaming house, and, on the intervention of the Minister of Justice it was set up that the money had been forfeited to the Crown under section 575 of the Criminal Code, but the ordinary rules of civil procedure will apply as, *e.g.*, in the matter of competency of witnesses: *O'Neil* v. *Tupper* (1896) 4 R. J. Q. (Q. B.) 315, 26 S. C. R. 122, esp. at p. 132.

[118] (1892) 21 O. R. 605.

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[119] It was doubtless on account of this decision that this section was repealed by 55 Vict. c. 14, s. 1, O. and the following section substituted:—'9. On the trial of any proceeding, matter, or question, under any Act of the legislature of Ontario or on the trial of any such proceeding, matter, or question, before any justice of the peace, mayor, or police magistrate, in any matter cognizable by such justice, mayor, or police magistrate, the party opposing or defending, or the wife or husband of the person opposing or defending, shall be competent or compellable to give evidence therein.' See now 8 Edw. VII. c. 43, s. 7, O.

[120] (1891) 20 O. R. 611. See per Rose, J., at pp. 612-4.

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[121] And see *Regina* v. *Becker* (1891) 20 O R. 676; *Regina* v. *Rowe* (1892) 121 C. L. T. 95.

[122] 21 O. R. at p. 612.

[123] Since the above was written, and in print, the judgments of the Supreme Court in *In re McNutt* (1912) 47 S. C. R. 259, have been reported and may be thought to militate against the views expressed in the text. In that case three out of six of the judges hold that a trial and conviction for keeping liquor for sale contrary to the provisions of the Nova Scotia Temperance Act are proceedings on a criminal charge within the meaning of sec. 39 (c) of the Supreme Court Act, R. S. C. 1906, c. 139, whereby an appeal is given from the judgment in any case of proceedings for or upon a writ of *habeas corpus* 'not arising out of a criminal charge.' The appellant had been imprisoned on a conviction for keeping liquor for sale in violation of the Nova Scotia Temperance Act. Fitzpatrick, C.J., says (p. 263):—"If this subject comes within the powers of the province then the right to impose punishment by imprisonment to enforce its provisions undoubtedly exists. Such legislation if enacted by the Imperial Government would be denominated criminal and fall within the category of criminal law; and I fail to understand how the element of criminality disappears merely because the Act is competent to the provincial legislature." Davies, J., says:—"The penalties and punishments it" (*sc.* the Nova Scotia Temperance Act) "prescribed for offences against its provisions, though in a sense criminal legislation, were not unconstitutional because they were necessary to effec-

Provincial penal laws. Predominance of Dominion parliament.—Several cases illustrating the dominance of Dominion criminal legislation over provincial penal laws, when the two are really *in eadem materia,* have been noticed

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tive legislation on the main subject-matter which the legislature was dealing with and were expressly authorised by subs. 15 of section 92 of the British North America Act. . . The offence for which the appellant was convicted and imprisoned came within the classification of public wrongs or crimes." Anglin, J., says (at p. 286):—"The word 'criminal' is, I think, used in sec. 39 (c)" (*sc.* of the Supreme Court Act) "in contra-distinction to the word 'civil' and connotes a proceeding which is not civil in its character. The proceeding against the appellant was of this class. I am, therefore, of the opinion that he cannot invoke the jurisdiction conferred by that section." On the other hand, Duff, J., dissents. He says (at p. 275): "By subs. 15 of section 92 the provinces are authorised to attach the sanctions of fine and imprisonment to acts or omissions in violation of their enactments; but it seems to be clear that consistently with the views expressed by Lord Halsbury" (*sc.* in *Attorney-General of Ontario* v. *Hamilton Street R. W. Co.*, [1903] A. C. 524, as to which see *supra* pp. 321, 597) "acts or omissions struck at by such penal enactments cannot with strict propriety be described as crimes, nor can the proceedings taken with a view to enforce the sanctions attached to them be properly described as criminal proceedings. . It is true, nevertheless, that the phrases 'crime' and 'criminal proceeding' may be used by a legislative body in a manner which is not strictly accurate, and it is necessary to consider whether there is anything in the Supreme Court Act, or in other enactments of the parliament of Canada . . justifying the inference that in the instance in question Parliament has used the phrase 'criminal charge' in a sense broad enough to include within its scope a charge made under a provincial statute.' He comes to the conclusion that it has not. Brodeur, J., based his decision on altogether other grounds, saying (p. 288):—"Some of my colleagues are quashing this appeal on the ground that the proceedings for the discharge of the appellant arose out of a criminal charge though based on a provincial statute. I do not think it would be advisable to decide this most important point. It was not mentioned in the factums of the parties and it was not discussed at bar, and I would not like to commit myself to such a proposition unless it would be fully argued." Idington, J., does not deal at all with the point, deciding on other grounds altogether. In *Regina ex. rel Brown* v.

under No. 27 of section 91.[124] We may add here a reference to *Regina* v. *Lawrence*,[125] where the distinction is taken, that, although under No. 15 of section 92 a provincial legislature may pass Acts which, in a strict and technical sense, ought to be called ' criminal laws,"[126] to enforce obedience to provincial laws, yet it cannot under pretence of doing this, legislate in regard to offences which are criminal offences at common law (such as tampering with witnesses and subornation of perjury), and wholly collateral to the prosecution for the violation of such provincial laws.

Simpson Co. (1896), 28 O. R. 231, it was held that a magistrate has no power to state a case under section 900 of the Criminal Code, 1892, for an alleged offence against an Ontario statute not involving the constitutionality of the statute, the procedure by way of appeal to the sessions provided for by the Ontario legislature applying in such a case. In *Rex* v. *Durocher* (1913) 9 D. L. R. 627, Kelly, J., held that when an act which is not an offence in common law is the subject of a distinct absolute prohibition by provincial statute on public grounds, the offence so created is one for the wilful commission of which an indictment will lie under section 164 of the Criminal Code (R. S. C. 1906, c. 146) which enacts that 'every one is guilty of an indictable offence and liable to one year's imprisonment, who, without lawful excuse, disobeys any Act . . . of any legislature in Canada by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law.' In this connection may be noticed some words of Sir Oliver Mowat, as premier of Ontario, in a report of December 8th, 1873, when he says:—"The local legislature has the right of imposing punishment for the violation of its laws; this punishment of the offence is inflicted for the good of the public, and is in no sense a civil remedy; a civil remedy being an action or a suit which one subject brings against another, to compel the performance of a contract or duty or to recover damages for the private benefit of the party suing: Hodgins' Prov. Legisl., 1867-1895, p. 1326.

[124] See *supra*, pp. 326-9. See also *supra*, pp. 123-7, and *Rex* v. *Garvin* (1908), 13 B. C. 331, 45 C. L. J. 494.

[125] (1878) 43 U. C. R. 164. See *Regina* v. *Holland* (1894) 30 C. L. J. 428, 14 C. L. T. 294, not reported elsewhere.

[126] *Sed quære.* See *supra*. pp. 580-3.

Accordingly it was held that a provision in the Ontario Liquor License Act that any person, who, in a prosecution under the Act, should tamper with a witness, should be guilty of an offence under the Act, and liable to a penalty, was *ultra vires* because the offence dealt with an offence at common law.[127]

In the recent case of *Rex* v. *Ferris*,[128] a District Court judge held that the Saskatchewan Act of 1906,—which provided that, 'if any person not registered . . . under this Act shall . . . for hire, gain, or hope of reward, furnish medicine,' he shall be guilty of an offence, and liable to a penalty, was *ultra vires* as against a representative of a company licensed under the Dominion Proprietary or Patent Medicine Act, 7-8 Edw. VII., c. 56, to sell medicines.[129] And in *Rex* v. *Laughton*,[130] it was held, conversely, that to rescue cattle from the custody of a pound keeper while he is taking the cattle to a pound, being a criminal offence in Manitoba by virtue of Imp. 6-7 Vict., c. 30, there in force, the provisions of that statute supersede the provisions of any municipal by-law purporting to impose penalties for the like offence.

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[127] See, too, *Regina* v. *Shaw* (1891), 7 Man. 518, *supra*, p. 614. See, also, *Fielding* v. *Thomas* [1896] A. C. 600, referred to *supra* pp. 157-9. *Regina* v. *Lawrence* was followed in *Regina* v. *Matheson*, September 15th, 1896, by an Ontario Divisional Court, unreported. A writer of an Article in 11 C. L. T. at p. 141, cites it "as illustrating the inability of the legislatures to deal with breaches of their own laws, where the offence is already known to the law as a criminal offence." Mr. Clement, however, (2nd. ed. p. 238, n. 5) submits that these authorities can go no further than this: that where an act is an offence at common law provincial legislation cannot authorise it, nor legislate with regard to it in its criminal aspect, but can legislate in reference to it in its civil aspect, so long as such provincial legislation is not repugnant to any Dominion enactment. See *supra*, pp. 329-330.

[128] (1910) 15 W. L. R. 331.

[129] The Dominion Act was passed in 1908 after the provincial Act. See *supra*, p. 124. Curiously enough the learned judge considers the Dominion Act as falling within No. 2 of section 91 ('the regulation of trade and commerce'), while at the same time, he cites as applicable the words of the judgment of the Privy Council in *Russell* v. *the Queen*, (1882) 7 App. Cas. at p. 838, which would rather suggest, as it is submitted is the better

There may also be cited in this connection, the report of Sir John Thompson, as Minister of Justice, of January 28th, 1889, wherein, referring to a Nova Scotia Act, giving a town council power to make by-laws for 'the prevention and punishment of vice, drunkenness, and immorality, and indecency in the public streets, highways, and other public places, and prevention of the profanation of Sunday,' he observes: "These matters are within the control of the parliament of Canada, and have been legislated upon by that parliament, and it can only be competent for a provincial legislature to enact laws in respect to them for the purpose of aiding the enforcement of the laws of Canada. In any other view it would be difficult to assent to

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view, that it is legislation "of a nature which falls within the general authority of Parliament to make laws for the peace, order, and good government of Canada, and has direct relation to criminal law." For, to quote the words of the learned judge himself, the Dominion Act in question—"provided for manufacturers or importers of patent medicines for the internal use of man becoming registered annually; it prohibited the sale of certain drugs in these preparations, or the distribution of samples; it provided for the appointment of government analysts, and the taking of samples of these medicines; and it restrained the improper use of the certificate of registration, and imposed penalties on persons violating the Act."

[130] (1912) 6 D. L. R. (Man.) 47; 22 M. R. 520.

the constitutional character of the provisions mentioned.''[131]

In *Re Stinson and College of Physicians,*[132] Riddell, J., held that the provisions of Ontario statutes conferring power on the Council of Physicians and Surgeons of Ontario to erase from their register the name of a practitioner for misconduct amounting to an indictable offence, although he has not been convicted of the offence is not *ultra vires,* because an enquiry under it " is not a criminal trial, involving punishment for the crime alleged,—it is merely the determination of facts upon which the civil rights of the accused may depend, just as an enquiry under R. S. O. 1897, c. 172, s. 44 " (conferring powers on the Benchers of the Law Society to suspend, disbar, or expel barristers and solicitors in case of misconduct) " by the Benchers of the Law Society. . . It is not a matter of criminal law but of civil rights ": (p. 634).

16. Generally all matters of a merely local or private nature in the province. — The general purport of this provincial residuary power has already been discussed at some length, and there is no need to repeat here what has been there stated.[133] Also several examples of provincial Acts held valid under this sub-section have been noticed under No. 15 of section 92.[134] It remains to notice, however, the decision of the Privy Council in *L'Union St. Jacques* v. *Belisle.*[135] Their lordships there held that a certain Act of the legislature of Quebec, passed for the relief of a benefit and benevolent Society in Montreal was *intra vires* under this section. As the judgment points out (at p. 35), the Act dealt solely with the affairs of that particular Society, and in this manner: taking notice of a certain state of embarrassment resulting from what is described in substance as improvident regulations of the Society, it imposed a forced commutation of their existing rights upon two widows, who, at the time when the Act was passed, were annuitants of the Society under its rules, reserving to them the rights so cut down in the future possible event of the improvement up to a certain point of the affairs of the Association. Their lordships held that clearly this matter was private and local, relating as it did to a benevolent or benefit Society incorporated in the City of Montreal within the province, which appeared to consist exclusively of members who would be subject *prima facie* to the control of the provincial legislature.[136]

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[131] Hodgins' Prov. Legisl. 1867-1895, at p. 581. As to the power of provincial legislatures to legislate in furtherance of Dominion Acts, see *supra*, pp. 571-3. The words of Dunkin, J., in *Ex parte Duncan* (1872), 16 L. C. J. at p. 191, quoted above p. 332, seem to imply that the Dominion parliament, having once legislated in respect to certain acts, the provincial legislature can no longer legislate in regard to them. And see the report of Sir J. Macdonald, as Minister of Justice, of November 4th, 1869, to the same effect: Hodgins' *Ibid.* at p. 484. But see *supra*, pp. 329-330.

[132] (1911) 22 O. L. R. 627.

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[133] *Supra,* pp. 140-3. As to provincial legislatures not being able to legislate on the enumerated subjects of section 91 of the British North America Act under the pretence, or contention, that the legislation is of a provincial or local character, see *supra* pp. 140-3; and as to a provincial legislature not being incapacitated from enacting a law otherwise within its proper competency merely because the Dominion parliament might under section 91, if it saw fit so to do, pass a general law which would embrace within its scope the subject matter of the provincial Act; but that, on the other hand, the abstinence of the Dominion parliament from legislating to the full limit of its powers, cannot have the effect of transferring to any provincial legislature any legislative power assigned to the Dominion by section 91 of the British North America Act, see *supra,* pp. 193-6; 289-290; and as to whether the provinces have any power of indirect taxation under No. 16 of section 92, see *supra,* pp. 411-414.

[134] *Supra,* pp. 574-5; 580-627.

[135] (1874) L. R. 6 P. C. 31.

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[136] See this case further noted, *supra*, pp. 83; 194.

CHAPTER XXVI.

EDUCATION.

In proceeding to deal with the provisions of the British North America Act relating to education, and the decisions thereunder, it appears best to set out in the first place *verbatim* the provisions of section 93 of the British North America Act, 1867.

93. In and for each Province the Legislature may exclusively make laws in relation to Education, subject and according to the following provisions:—

(1) Nothing in any such law shall prejudicially affect any Right and Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union.

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec.

(3) Where in any Province a System of Separate or Dissentient Schools exists by law at the Union or is thereafter

established by the Legislature of the Province, an Appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education.

(4) In case any such provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council on any Appeal under this section is not duly executed by the proper provincial Authority in that Behalf, then and in every such Case, and as far only as the circumstances of each Case require, the parliament of Canada may make remedial Laws for the due execution of the provisions of this section and of any decision of the Governor-General in Council under this section.

The decisions under this section, and under the corresponding section in the Dominion Act establishing the province of Manitoba, 33 Vict. (1870) c. 3, s. 22, and known as the Manitoba Act, largely turn upon questions of fact, namely, whether the New Brunswick Common Schools Act, 1871, prejudicially affected rights or privileges of the Roman Catholics in the province with respect to denominational schools which they had by law at the Union;[1] whether the Manitoba Public Schools Act of 1890 prejudicially affected any right or privilege which the Roman Catholics, by law or practice, had in that province at the Union;[2] whether any rights or privileges of the Roman Catholic minority in Manitoba which accrued to them after the Union under statutes of that province, had been interfered with by the above Act of 1890, and another provincial statute of the same year.[3] But incidentally to the determination of those questions of fact several points have been decided as to the construction of the section which have now to be mentioned. They are not rendered any easier of treatment, however, by the fact that most of them were decided in connection with the two cases under the Manitoba Act, section 22 of which, although very similar to section 93 of the British North America Act, is not quite identical with it. The better course would seem, therefore, to be to take, first, the decisions bearing on section 93 of the British North America Act, whether they bear also on section 22 of the

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[1] *Maher* v. *Town of Portland* before the Privy Council, July 17th, 1874; Wheeler's Confederation Law, pp. 362-7 (where alone apparently reported, though briefly noted 2 Cart. at p. 486, n.; being an appeal from *Ex parte Renaud* (1873), 14 N. B. (1 Pugs.) 273. The authorities under this section will be found conveniently collected and dealt with at length in Wheeler's Confederation Law (1896) at pp. 332-388. See, also, Keith's Responsible Government in the Dominions, Vol. 2, pp. 689-96.

[2] *City of Winnipeg* v. *Barrett* [1892] A. C. 445, 19 S. C. R. 374, 7 Man. 273. In *Brophy* v. *Attorney-General of Manitoba*, *infra*, at p. 215, the Privy Council themselves say that this was the sole question raised in the Barrett case.

[3] *Brophy* v. *Attorney-General of Manitoba* [1895] A. C. 202, 22 S. C. R. 577. See [1895] A. C. at p. 223.

Manitoba Act, or not; and then to set out *verbatim* section 22 of the Manitoba Act, and mention the decisions applicable only to it, and not also to section 93 of the British North America Act.

Why section 93 was enacted. — We cannot begin the discussion of this section better than by quoting the explanatory words of the Privy Council in *Brophy* v. *Attorney-General of Manitoba,*[4] as to the reason of its enactment:— "In 1867 the union of the provinces of Canada, Nova Scotia, and New Brunswick, took place. Among the obstacles which had to be overcome in order to bring about that union, none perhaps presented greater difficulty than the differences of opinion which existed with regard to the question of education. It had been the subject of much controversy in Upper and Lower Canada. In Upper Canada a general system of undenominational education had been established, but with provision for separate schools to supply the wants of the Catholic inhabitants of that province. The second sub-section of section 93 of the British North America Act extended all the powers, privileges, and duties, which were then by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Roman Catholic inhabitants of that province to the dissentient schools of the protestant and Roman Catholic inhabitants of Quebec." To this we may add the words of Fisher, J., in *Maher* v. *Town of Portland*[5]:—

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[4] [1895] A. C. 202, at pp. 213-4.

[5] 14 N. B. (1 Pugs.) at p. 293, *sub nom. Ex parte Renaud.*

"The exclusive power of legislating upon the subject of education is by the 93rd section of the British North America Act, conferred thus upon the legislature of each province, subject to the reservation of the rights of any class of persons with respect to denominational schools. Everyone acquainted with the history of the province which comprised Canada before the Union knows the reason for the insertion of some of the provisions of this section. It was found to be the only mode of solving the question that had caused serious difficulty with Government and legislature of that province. Paragraphs 2 and 3 were constructed to solve and settle these difficulties."[6]

Scope of section 93 as a whole.—In *Maher* v. *Town of Portland,*[7] Ritchie, C.J., says: "It cannot be denied that to the provincial legislatures is confided the exclusive right of making laws in relation to education; and that they, and they only, have the right to establish a general system of education, applicable to the whole province, and all classes and denominations, provided always they have due regard to the rights and privileges protected by section 93 of the British North America Act, 1867." This section does not debar a province from establishing a national system of unsectarian education. Thus in *City of Winnipeg* v. *Barrett,*[8] the Privy Council say: "In their lordships' opinion, it would be going much too far to hold that the establishment of a national system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain denominational schools that the two things cannot exist together, or that the existence of the one necessarily implies, or involves, immunity from taxation for the purpose of the other."

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[6] The learned judge adds:—"and, at present, only apply to that province now consisting of Ontario and Quebec, where schools were in operation at the Union answering the description given them in these paragraphs."

[7] 14 N. B. (1 Pugs.) at p. 291; *sub nom. Ex parte Renaud.*

[8] [1892] A. C. at p. 454.

Paramount power of Imperial parliament to legislate not excluded by section 93.—In *Regina* v. *College of Physicians and Surgeons of Ontario,*[9] the Ontario Court of Queen's Bench held that the Imperial Medical Act passed in 1868 applied to Canada, and overrode the provisions of the provincial Act of 1874 as to the examination of applicants for registration as medical practitioners in Ontario, although the subject of education is placed within its exclusive jurisdiction by the British North America Act. Hagarty, C.J., says:[10] It was ably urged that as the subject of education was one in which the exclusive right was given to this province, we should read the subsequent Imperial Act as not interfering with the right so granted. To this it may be answered that where the Federation Act speaks of any such exclusive right, it means exclusive as opposed to any attempt to legislate by the Dominion parliament. But it appears to us that the language of the Imperial Act already cited is too clear for dispute.[11]

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[9] (1879) 44 U. C. R. 564.

[10] At p. 576.

[11] See generally as to the supremacy of the Imperial parliament, *supra*, pp. 51-58.

We can now proceed to consider the construction of the four sub-sections, which qualify the provincial power to make laws in relation to education; and the first question which presents itself is what are 'denominational schools' within the meaning of the section?

'**Denominational schools.**'—The remark of Mellish, L.J., on the argument of *Maher* v. *Town of Portland* before the Privy Council as reported at length in Wheeler's Confederation Law of Canada,[12] indicated by anticipation the view of their lordships as to what would constitute a denominational school within the section. He asks: "Must not a denominational school within the meaning of the first sub-section of section 93, be a school which is to be always denominational? Would a school which may be denominational one year, and belong to a particular sect, and, then, the next year to another sect, according to the majority of the inhabitants in its favour, be a denominational school, which any particular class have by law?" Accordingly in their judgment, after quoting, and in every way endorsing, the words of Fisher, J., in the Court below,[13] where he describes the provisions of the New Brunswick Parish Schools Act, 1858, which was in force at the Union, under which it was alleged that the Roman Catholics of the province had possessed certain rights and privileges with respect to denominational schools which the provincial Common Schools Act, 1871, had prejudicially affected, and where he shows that so far from establishing denominational schools, the legislature under the Act of 1858 had been zealous in preserving the schools from any denominational or sectarian tendency, and that no class or creed had under the Act any peculiar right, either in the general government of the whole province, or in any parish or school—their lodships say,[14]:—"It has been contended on the part of the appellant that *de facto* they became denominational schools in this way—that is to say, that, whereas the whole machinery was left local, the ratepayers had the power of appointing the master, and of appointing the trustees of the schools, but where the whole inhabitants of a district, or the great majority of a district, belonged to the Roman Catholic faith, or belonged to a protestant sect, there they could so work the school practically as to give it a denominational character, or a denominational hue; that is to say, if all the children were Roman Catholic, Roman Catholic teaching would be found in that school; but the fact that that might be the accidental result of the mode of working the Act under the old system is not to give a legal right to that denomination, which was the right alone which was intended to be protected by the Federation Act of the Dominion of Canada. It is an accident which might have happened to-day, and might have been reversed to-morrow by a change of the inhabitants of the district, or a change in their views; and that is not a thing to which it is possible to give the colour of a legal right. Their lordships are, therefore, of opinion that there is nothing in the ground taken by the appellant, or anything unconstitutional in the Act of New Brunswick" (*sc.* the Common Schools Act, 1871). In another part of his judgment, not quoted by the Privy Council,[15] Fisher, J., says: "What is a denominational school? In my opinion, it is a school under the exclusive government of some one denomination of Christians, and where the tenets of that denomination are taught. But assume that a school answering either of these requisites is a denominational school, and this is the lowest ground upon which it can be put, and then examine the laws in force at the Union to ascertain if any such school then existed by law, and if the right of any class of persons therein has been prejudicially affected by the Common Schools Act. There were denominational schools in existence at the Union . . . but they are not touched by the Common Schools Act, 1871, they remain in the enjoyment of all the rights they had at the Union." Fisher, J., further observes that,[16] if a certain provision in the Parish Schools Act, 1858, as to having the Bible read in the schools, created a right, and if the Bible is a denominational book, "that will not help the *ultra vires* argument, because, if it were so, it is a right or privilege which a class of persons had by law at the Union, to have the Bible read in a Parish school, not in a denominational school, and that is not a right secured by the British North America Act, 1867, even if it existed."

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[12] At p. 364. And in the same argument James, L.J., is reported as saying: "A denominational school must *ex vi termini* mean a school established by, and exclusively belonging to, a particular denomination. There might be a denominational school for Mahommedans or Parsees." To which Mellish, L. J., adds: "A school where the peculiar tenets of a particular sect are taught, and the tenets of no other sect are taught, because if you allow all sects to come at their own hours, and teach their own tenets, that would not make it a denominational school." Again (at p. 364), Counsel for the appellant saying:—"Is it possible to say these schools should not be (considered) denominational having regard to the way in which the Act was worked?" James, L.J., is reported as replying: "I do not think we can look at that; we have a plain Act of parliament to construe, and we have nothing to do with the mode in which it is worked." As to the reference in subs. 1 of section 93 being to rights and privileges in respect to denominational schools only, and not to any rights and privileges with respect to religious teaching in schools generally, see *Ex parte Renaud* (1873), 14 N. B. (1 Pugs.) at p. 298.

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[13] 14 N. B. (1 Pugs.) at pp. 294-98, *sub nom. Ex parte Renaud.*

[14] Wheeler, *op. cit.*, p. 367.

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[15] 14 N. B. (1 Pugs.) at p. 294. See also, per Ritchie, C.J., at pp. 286-7; and per Bain, J., in *City of Winnipeg* v. *Barrett* (1891), 7 Man. at p. 371.

In the course of the argument before the Privy Council in *Maher* v. *Town of Portland,* as reported in Wheeler's Confederation Law,[17] Mellish, L.J., is reported as asking: "Were there any schools clearly denominational schools, Roman Catholic or protestant, in any one of the four provinces which were supported by rates on all the Queen's subjects, without reference to their religion?" To which Mr. Duff, Q.C., of counsel for the appellant, a ratepayer who was attacking the provincial legislation, answers 'No.'

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[16] 14 N. B. (1 Pugs.) at p. 298. As to collegiate institutions not being within the contemplation of section 93, see per Ritchie, C.J., S. C. at p. 277. For an application under it in reference to an alleged discrimination in a Quebec Act against the Protestant universities and schools of Quebec, in regard to the admission of students to the study of law, see Hodgins' Prov. Legisl. 1867-1895, pp. 337-8.

[17] At p. 365.

'Prejudicially affect any right or privilege.' See *infra* pp. 657-661.

'Any class of persons.'—In *Maher* v. *Town of Portland,*[18] Ritchie, C.J., says, delivering the judgment of himself and Allen and Weldon, J.J.: "We think that the term 'denomination' or 'denominational' as generally used, is, in its popular sense, more frequently applied to the different denominations of protestants, than to the Church of Rome; and that the most reasonable inference is that sub-s. 1 was intended to mean just what it expresses, namely that 'any,' that is "every" class of persons having any right or privilege with respect to denominational schools whether such class should be one of the numerous denominations of protestants, or Roman Catholics, should be protected in such rights."

'Have by law.'—In the same case,[19] Ritchie, C.J., points out that "the mere fact that in exceptional cases, certain schools under the New Brunswick Parish Schools Act, 1858, drawing provincial aid may have been made for the time being, with or without the knowledge or sanction of the Board of Education, denominational, by reason of the teacher instructing the children exclusively in doctrines of a particular denomination, or using the prayers, or books, or daily teaching the catechism peculiar to such denominations" could not "confer any legal right or privilege on any class of persons with respect to denominational schools, or give the denomination whose tenets may have been so taught in any such school, rights or privileges other than those possessed by all, and every, the humblest inhabitant of the Parish in which such schools existed, free and independent of all denominational connection.'' He says further:[20] "Surely the rights contemplated must have been legal rights: in other words, rights secured by law, or which they had under the law at the time of the Union;"[21] and concludes—[22] "What possible legal means could any denomination have invoked upon the old Parish School Act, 1858, to compel any one school to be made denominational, or to require and insist that in any one school denominational tenets, doctrines, precepts, and practices, should be taught or used? But then it was repeatedly urged upon us that under the Parish School Act circumstances might, and very often did, concur where the schools might, and in numerous cases did, become denominational; but that by reason of section 60 of the Common Schools Act such was not now possible. The answer is simply this: The inability of a class of persons to have under the Common Schools Act that which possibly they might, under certain exceptional and accidental circumstances, have had under the Parish School Act, 1858, but which they had no right to insist on having, is a damage not occasioned by anything which the law esteems an injury—a kind of damage termed in law *damnum absque injuria,* and for which there is no remedy. And so in this case, as there was no legal right to have denominational schools or denominational teaching, there is no injury in legal contemplation committed by the legislature dealing with the question in such a manner as to prevent the possibility arising, and consequently no right to have the action of the legislature abrogated.[23] It may be a very great hardship that a large class of persons should be forced to contribute to the schools to which they are conscientiously opposed, or be shut out from what they have hitherto, under certain circumstances, enjoyed, and be without remedy; but by any such considerations, Courts of Justice ought not to be influenced."

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[18] 14 N. B. (1 Pugs.) at p. 287, *sub nom. Ex parte Renaud.*

[19] At p. 277.

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[20] At p. 292.

[21] So per Fisher, J., at p. 294.

[22] At p. 292.

Sub-section 1 of section 93 does not prohibit all legislation respecting denominational schools.—In *City of Winnipeg* v. *Barrett,*[24] Patterson, J., observes: "There is no general prohibition of legislation which shall affect denominational schools. The prohibition relates only to the rights and privileges of classes of persons, and to legislation which injuriously affects such rights. There is, therefore, room for legislative regulation on many subjects as, for example, compulsory attendance of scholars, the sanitary condition of school houses, the imposition and collection of rates for the support of denominational schools, and sundry other matters which may be dealt with without interfering with the denominational characteristics of the school, and which, I suppose, were dealt with in the statutes of the province that were repealed in 1890 to make way for the system now complained of." And so in *Separate School Trustees of Belleville* v. *Grainger,*[25] Blake, V.C., held that sub-section 1 was not meant to preclude all legislation, as was shown by the other sub-sections; and that an Act remedying defects in, and improving the machinery for, working out the separate school system, as in respect to the election of trustees, was *intra vires.*[26]

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[23] And see the extract from the judgment of the Privy Council in this case, *supra*, p. 637.

[24] 19 S. C. R. at p. 425.

In his report of Jan. 20th, 1872, on the New Brunswick Common Schools Act, 1871, Sir John Macdonald, then Minister of Justice, expressed it as his opinion that the provisions of section 93 of the British North America Act applied exclusively to denominational, separate, or dissentient schools, and did not, in any way, affect or lessen the powers of the provincial legislatures to pass laws respecting the general educational system of the province.[27]

Acquiescence no bar to proceeding under section 93.—In *Logan* v. *City of Winnipeg,*[28] it was held that the fact of the applicant having acquiesced for a number of years in a system of schools by which he, with other members of the Church of England, was taxed for schools common to all protestants, did not bar him from enforcing his rights under section 93 of the British North America Act. Taylor, C.J., says: "It is a public right he (the petitioner) is now contending for, and I do not see that such a constitutional right can be waived; it may slumber, or not be enforced, but it is there all the time."[29]

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[25] (1878) 25 Gr. 570, at p. 579.

[26] For cases where such legislation was in question, see *In re Roman Catholic Separate Schools* (1889), 18 O. R. 606; and *Roman Catholic Separate Schools* v. *Township of Arthur* (1891) 21 O. R. 60.

[27] Hodgins' Prov. Legisl. 1867-1895, p. 662. *Cf.* per Taylor, C.J., in *City of Winnipeg* v. *Barrett* (1891), 7 Man. at p. 329; also S. C. at pp. 298-9, 375.

[28] (1891) 8 Man. 3. Heard in appeal with *City of Winnipeg* v. *Barrett* [1892] A. C. 445, where the case being decided against the plaintiff on the merits, the point is not dealt with.

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[29] At p. 15. It would seem, however, that one may, under certain circumstances, be estopped from setting up the unconstitutionality of a statute: see, as to this, *Ross* v. *Guilbault* (1881) 4 L. N. 415; *Ross* v. *Canada Agricultural Ins. Co.*, (1882) 5 L. N. 23; *Forsyth* v. *Bury* (1888), 15 S. C. R. 543; *McCaffery* v. *Ball* (1889) 34 L. C. J. 91. And in *Belanger* v. *Caron* (1879) 5 Q. L. R. at p. 25, Stuart, J., says:—"No Court should or can declare an Act void except in a case where its unconstitutionality is pleaded in due form by some one having an interest in questioning the validity of it." But as to this, see *contra* per Meredith, C.J., in *Valin* v. *Langlois* (1879) 5 Q. L. R. at p. 16, who says:—"To me it seems plain that a statute emanating from a legislature not having power to pass it is not law; and that it is as much the duty of a judge to disregard the provisions of such a statute, as it is his duty to obey the law of the land." And so per Duval, C.J., in *L'Union St. Jacques de Montreal* v. *Belisle* (1872) 20 L. C. J. at p. 39. And in his report as Minister of Justice on the Ontario Acts of 1889 (Hodgins' Prov. Legisl. 1867-1895, at p. 216), the late Sir John Thompson says:—"If the provincial Act creating an offence and a penalty therefor is void any enactment like this to give effect to it, if the objection to it is not taken at a certain stage, would be ineffectual. This provision is also open to the objection that it is an attempt to limit the power of the Courts to adjudicate upon the constitutionality of provincial legislation." As to the duty to uphold the Constitution, see per Henry, J., in *City of Frederiction* v. *The Queen* (1880), 3 S. C. R. at p. 28; per O'Connor, J., in *Gibson* v. *Macdonald*, (1885) 7 O. A. R. at p. 416. See also *King* v. *Joe* (1891) 8 Haw. Rep. 287; Cooley on Constitutional Limitations, 5th ed., pp. 196-7.

Effect of section 93 as to Roman Catholic Schools in Upper Canada at the Union. — We have already seen,[30] that in the course of the argument before the Privy Council in *Maher* v. *Town of Portland,* Duff, Q.C., of counsel for the appellant, who was attacking the provincial legislation under section 93 of the Federation Act, admitted in answer to a question of Mellish, L.J., that there were no schools clearly denominational, whether Roman Catholic or protestant, in any of the four provinces which were supported by rates on all the Queen's subjects without reference to their religion. A little later in the argument Mellish, L.J., is reported as observing:[31] " I can find nothing in the first sub-section which prevented the legislature of Upper Canada repealing the peculiar laws by which the Roman Catholic Schools in Upper Canada were established. The second sub-section assumes that by the first sub-section that has been prevented, but it does not itself enact it. There is nothing to prevent the legislature in Upper Canada repealing all the powers, privileges, and duties conferred on separate schools for the Queen's subjects in Upper Canada except the first sub-section."

Sub-section 3. 'Where in any province a system of separate or dissentient schools exists by law at the Union.'—It was contended in 1877, that an appeal of the Roman Catholic community of the province lay to the Governor-

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[30] *Supra,* p. 639.

[31] Wheeler *op. cit.* at p. 366.

General under this sub-section in respect to the Prince Edward Public Schools Act, 1877, because,—although there was no provision in any of the previous Acts of the local legislature securing to any sect the right of establishing an independent school, yet Roman Catholic Separate Schools had been virtually in operation before the Union; and that it was permissible, under section 93 of the Federation Act, to call on the Federal Government to prevent the provincial legislature from establishing any regulation with respect to schools, generally, without securing to them the right of maintaining separate and denominational schools. The Minister of Justice, however, in his report of November 8th, 1877, upon the Act, held the contrary.[32]

Sub-section 3. ' From any Act or decision of any provincial authority.'—In the corresponding sub-section of the provision relating to education in the Manitoba Act,[33] the words are ' from any Act, or decision of the legislature of the province, or of any provincial authority; but in *Brophy* v. *Attorney-General of Manitoba*,[34] the Privy Council express their dissent from the argument that the insertion of the words ' of the legislature of the province ' in the Manitoba Act show that in the British North America Act, it could not have been intended to comprehend the legislatures under the words ' any provincial authority.'

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[32] Hodgins' Prov. Legisl. 1867-1895, at pp. 1189-97. Wheeler *op. cit.* at p. 338.

[33] *Infra*, p. 653.

[34] [1895] A. C. 202, at p. 221.

Sub-sections 3 and 4 do not oust jurisdiction of the ordinary tribunals to act under sub-section 1.—In *City of Winnipeg* v. *Barrett,*[35] the Privy Council says of sub-sections 2 and 3 of section 22 of the Manitoba Act, which so far as the present point is concerned, may be said to be identical with sub-sections 3 and 4 of the British North America Act: " At the commencement of the argument a doubt was suggested as to the competency of the present appeal, in consequence of the so called appeal to the Governor-General in Council provided by the Act. But their lordships are satisfied that the provisions of sub-sections 2 and 3 " (*sc.* of section 22 of the Manitoba Act) " do not operate to withdraw such a question as that involved in the present case " (*sc.* whether the Manitoba Public Schools Act, 1890, prejudicially affected any right or privilege with respect to denominational schools which any class of persons had by law (or practice)[36] in the province at the Union) " from the jurisdiction of the ordinary tribunals of the country." In other words, sub-sections 3 and 4 do not deprive parties of their right to resort to the Courts in case the provisions of sub-section 1 are contravened.[37]

Neither do sub-sections 3 and 4 give a concurrent remedy where sub-section 1 is infringed.

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[35] [1892] A. C. 445, at p. 452.

[36] The Manitoba section contains the words 'or practice;' the British North America Act does not. See *infra*, pp. 657-661.

[37] Their lordships refer to this holding in the subsequent case of *Brophy* v. *Attorney-General of Manitoba* [1895] A. C. 202, at pp. 213-6.

General construction of these two sub-sections. —In *Brophy* v. *Attorney-General of Manitoba*,[38] the Privy Council, after remarking that any enactment contravening the provisions of sub-section 1 of section 93 of the Federation Act is beyond the competency of the provincial legislature, and, therefore, null and void, and that it was so decided in the *Barrett case,* and that sub-sections 2 and 3 of section 22 of the Manitoba Act, identical so far as the present point is concerned, with sub-sections 3 and 4 of section 93 of the Federation Act, are certainly not designed only to enforce the prohibition contained in sub-section 1, proceed to say: "It is hardly necessary to point out how improbable it is that it should have been intended to give a concurrent remedy by appeal to the Governor-General in Council. The inconveniences and difficulties likely to arise, if this double remedy were open, are obvious. If, for example, the Supreme Court of Canada, and this Committee on Appeal, declared an enactment of the legislature of Manitoba relating to education to be *intra vires,* and the Governor-General in Council, on an appeal to him, considered it *ultra vires,* what would happen? If the provincial legislature declined to yield to his view, as would almost certainly and most naturally be the case, recourse could only be had to the parliament of the Dominion. But the parliament of Canada is only empowered to legislate as far as the circumstances of the case require 'for the due execution of the provisions' of the 22nd section" (*sc.* of the Manitoba Act, corresponding to section 93 of the Federation Act). "If it were to legislate in such a case as has been supposed, its legislation would necessarily be declared *ultra vires* by the Courts which had decided that the provisions of the section had not been violated by the legislature of the province. If, on the other hand, the Governor-General declared a provincial law to be *intra vires,* it would be an ineffectual declaration. It could only be made effectual by the action of the Courts, which would have for themselves to determine the question which he decided, and if they arrived at a different conclusion, and pronounced the enactment *ultra vires,* it would be none the less null and void because the Governor-General in Council had declared it *intra vires.* These considerations are, of themselves, most cogent to shew that sub-section 2" (*sc.* of section 22 of the Manitoba Act, corresponding with sub-section 3 of section 93 of the Federation Act), "ought not to be construed as giving parties aggrieved an appeal to the Governor-General in Council concurrently with the right to resort to the Courts in case the provisions of the first sub-section are contravened, unless no other construction of the sub-section be reasonably possible." Their lordships, then, proceed to examine the terms of sub-section 2 of the Manitoba section, and point out that they greatly strengthen the conclusion suggested by the other parts of section 93, saying: "The first sub-section is confined to the right or privilege of a 'class of persons' with respect to denominational education 'at the Union,’ the second sub-section applies to laws affecting a right or privilege ‘ of the protestant or Roman Catholic minority ’ in relation to education. If the object of the second sub-section had been that contended for by the respondent, the natural and obvious mode of expressing such intention would have been to authorise an appeal from any Act of the provincial legislature affecting ‘ any such right or privilege as aforesaid.’ The limiting words ‘ at the Union ’ are, however, omitted; for the expression ‘ any class of persons ’ there is substituted ‘ the protestant or Roman Catholic minority of the Queen’s subjects; ’ and, instead of the words ‘ with respect to denominational schools,’ the wider term, ‘ in relation to education ’ is used. The first sub-section invalidates a law affecting prejudicially the right or privilege of ‘ any class ’ of persons, the second sub-section ” (corresponding to the third sub-section of section 93 of the Federation Act) “ gives an appeal only where the right or privilege affected is that of the ‘ protestant or Roman Catholic minority.’ Any class of the majority is clearly within the purview of the first sub-section, but it seems equally clear that no class of the protestant or Catholic majority would have a *locus standi* to appeal under the second sub-section, because its rights or privileges had been affected. Moreover, to bring a case within that sub-section, it would be essential to show, that a right or privilege had been ‘ affected.’ Could this be said to be the case because a void law had been passed which purported to do something, but was wholly ineffectual? To prohibit a particular enactment, and render it *ultra vires,* surely prevents it affecting any rights. It would do violence to sound canons of construction if the same meaning were to be attributed to the very different language employed in the two sub-sections. In their lordships' opinion, the second sub-section" (*sc.* of the Manitoba section, corresponding to sub-section 3 of the Federation Act) "is a substantive enactment, and is not designed merely as a means of enforcing the provision which precedes it."

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[38] [1895] A. C. 202, at p. 217.

Sub-section 3. 'Any provincial authority.'—In *Separate School Trustees of Belleville* v. *Grainger,*[39] Blake, V.C., seems to have been of opinion that 'act of any provincial authority' in sub-section 3 of section 93 would include an Act of the provincial legislature; and that the matters which are contemplated as those which should be presented to the supreme authority are such as are Acts, or their equivalent, and not the mere everyday detail of the working of a school. The words of the Privy Council in *Brophy* v. *Attorney-General of Manitoba,*[40] may now be cited in support. In sub-section 2 of section 22 of the Manitoba Act which corresponds to this sub-section, the words 'of the legislature of the province or' are inserted before the words 'any provincial authority.'

Regulations made under provincial Acts relating to education; and sub-section 4 of section

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[39] (1878) 25 Gr. 570, at p. 581.

[40] [1895] A. C. 202, at pp. 220-1.

93.—In *Ex parte Renaud,*[41] the Court held, as is obvious enough, that the constitutionality of a provincial Act relating to education cannot be affected by any regulation made under it, there being nothing unconstitutional in the Act itself. Ritchie, C.J., says at p. 289: "We fail to see because the Board of Education may not have made such a regulation as they ought in such a case to have made, or have made a regulation that they ought not to have made, that the action of the Board, or its non-action, can render the Act of the legislature inoperative. If the right and privilege fall under section 93, and if there is no power to compel the Board of Education to make such a regulation, or the legislature should have inserted a clause in the Common Schools Act, 1871," (the provincial Act impeached) "requiring them to do it, is not this just such a case where sub-section 4 of section 93 of the British North America Act applies?"

Section 22 of the Manitoba Act.—We can now proceed to consider section 22 of the Act of 1870 establishing the province of Manitoba, which, as the Privy Council say in *Brophy* v. *Attorney-General of Manitoba,*[42] was intended to be a substitute for the 93rd section of the British North America Act: "Obviously, all that was intended to be identical has been repeated, and in so far as the provisions of the Manitoba Act differ from those of the earlier statute, they must be regarded as indicating the variations from those provisions intended to be introduced in the province of Manitoba." Again in a later passage of their judgment, their lordships say:[43] "It is notorious that there were acute differences of opinion between Catholics and protestants on the education question prior to 1870. . . . There is no doubt either what the points of difference were, and it is in the light of these that the 22nd section of the Manitoba Act of 1870, which was in truth a parliamentary compact must be read." We must now set out the section *verbatim*:—

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[41] (1873) 14 N. B. (1 Pugs.) 273.

[42] [1895] A. C. 202, at p. 213.

22. In and for the province, the said (provincial) legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

(1) Nothing in any law shall prejudicially affect any right or privilege with respect to Denominational Schools,[44] which any class of persons,[45] have by law or practice in the province at the Union.

(2) An appeal shall lie to the Governor-General in Council from any act or decision of the legislature of the province, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's Subjects in relation to education.[46]

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[43] At p. 228.

[44] See *supra*, p. 636.

[45] See *supra*, p. 640.

[46] As to sub-sections 2 and 3 not ousting the jurisdiction of the ordinary tribunals, and as to the fact that they are not to be construed as giving a concurrent remedy where sub-section 1 is infringed, see *supra*, pp. 647-651.

(3) (Is identical with sub-section 4 of section 93 of the British North America Act as to which see *supra* pp. 631, 647-652.)[47]

Explanation of the enactment of this section of the Manitoba Act.—In *Brophy* v. *Attorney-General of Manitoba*,[48] the Privy Council explain the enactment of this section as follows:[49] "There can be no doubt that the views of the Roman Catholic inhabitants of Quebec and Ontario with regard to education were shared by the members of the same community in the territory which afterwards became the province of Manitoba. They regarded it as essential that the education of their children should be in accordance with the teaching of their Church, and considered that such an education could not be obtained in public schools designed for all the members of the community alike, whatever their creed, but could only be secured in schools conducted under the influence and guidance of the authorities of their Church. At the time when the province of Manitoba became part of the Dominion of Canada the Roman Catholic and protestant populations were about equal in number. Prior to that time there did not exist in the territory then incorporated any public system of education. The several religious denominations had established such schools as they thought fit, and maintained them by means of funds voluntarily contributed by the members of their own communion. None of them received any State aid. The terms upon which Manitoba was to become a province of the Dominion were matter of negotiation between representatives of the inhabitants of Manitoba and of the Dominion Government. The terms agreed upon, so far as education was concerned, must be taken to be embodied in the 22nd section of the Act of 1870. Their lordships do not think that anything is to be gained by the inquiry how far the provisions of this section placed the province of Manitoba in a different position from the other provinces, or whether it was one more or less advantageous. There can be no presumption as to the extent to which a variation was intended. This can only be determined by construing the words of the section according to their natural signification. . . Those,[50] who were stipulating for the provision of section 22 as a condition of the Union, and those who gave their legislative assent to the Act by which it was brought about, had in view the perils then apprehended. The immediate adoption by the legislature of an educational system obnoxious either to Catholics or protestants would not be contemplated as possible. As has been already stated the Roman Catholics and protestants in the province were about equal in number. It was impossible at that time for either party to obtain legislative sanction to a scheme of education obnoxious to the other. The establishment of a system of public education in which both parties would concur was probably then in immediate prospect. The legislature of Manitoba first met on March 15th, 1871. On the 3rd of May following the Education Act of 1871 received the royal assent. But the future was uncertain. Either Roman Catholics or protestants might become the preponderating power in the legislature, and it might under such conditions be impossible for the minority to prevent the creation, at the public cost, of schools, which though acceptable to the majority, could only be taken advantage of by the minority on the terms of sacrificing their cherished convictions. The change to a Roman Catholic system of public schools would have been regarded with as much distaste by the protestants of the province as the change to an unsectarian system was by Catholics.''

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[47] The corresponding provision in the Alberta Act (1905), 4-5 Edw. VII., D., is contained in section 17 of that Act, and is as follows:—

'17. Section 93 of the British North America Act, 1867, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph:—

(1). Nothing in any such law shall prejudicially affect any right or privilege with respect to Separate Schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-West Territories, passed in the year 1901 or with respect to religious instruction in any Public or Separate School as provided for in the said ordinances.

(2). In the appropriation by the legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29, or any Act passed in amendment thereof, or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

(3). Where the expression 'by law' is employed in paragraph 3 of the said section 93 it shall mean the law as set out in the said chapters 29 and 30, and where the expression 'at the Union' is employed in the said paragraph 3, it shall be held to mean the date at which this Act comes into force.'

Section 17 of the Saskatchewan Act (1905), 4-5 Edward VII. c. 42, is identical.

Reference may be made to the speech of Sir W. Laurier as to Separate Schools in the new Provinces, of Feb. 21, 1905: House of Commons Debates, Vol. 69, p. 1442.

[48] [1895] A. C. 202.

[49] At pp. 214-5. The passage immediately follows that in which they explain the enactment of section 93 of the British North America Act. See *supra*, p. 633.

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[50] P. 219.

Sub-section 1. 'Prejudicially affects any right or privilege' with respect to denominational schools[51] which any class of persons[52] have by law or practice in the province at the Union.—In *City of Winnipeg* v. *Barrett,*[53] the Privy Council pronounce upon the reason and meaning of the words 'or practice' in this clause, which are not found in section 93 of the Federation Act. They there say: "Sub-sections 1, 2, and 3 of section 22 of the Manitoba Act, 1870, differ but slightly from the corresponding sub-sections of section 93 of the British North America Act, 1867. The only important difference is that in the Manitoba Act, in sub-section 1, the words 'by law' are followed by the words 'or practice' which do not occur in the corresponding passage in the British North America Act, 1867. These words were no doubt introduced to meet the special case of a country which had not as yet enjoyed the security of laws properly so called. It is not, perhaps, very easy to define precisely the meaning of such an expression as 'having a right or privilege by practice.' But the object of the enactment is tolerably clear. Evidently the word 'practice' is not to be considered as equivalent to 'custom having the force of law.' Their lordships are convinced that it must have been the intention of the legislature to preserve every legal right or privilege, and every benefit or advantage in the nature of a right or privilege, with respect to denominational schools, which any class of persons practically enjoyed at the time of the Union." Then, after pointing out that, as was admitted, there was no law or regulation or ordinance with respect to education in force in Manitoba when she was admitted to the Union, but that, in practice, the members of the Roman Catholic Church supported the schools of their own Church for the benefit of Roman Catholic children, and were not under obligation to, and did not contribute to the support of any other schools; and observing that, possibly, if positive enactment had defined and recognized the right so to establish such schools at their own expense, it might have had attached to it as a necessary or appropriate incident, the right of exemption from any contribution under any circumstances to schools of a different denomination, — their lordships go on to say:[54] "But, in their lordships' opinion, it would be going much too far to hold that the establishment of a national system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain denominational schools that the two things cannot exist together, or that the existence of the one necessarily implies or involves immunity from taxation for the purpose of the other. It has been objected that, if the rights of Roman Catholics and of other religious bodies in respect of their denominational schools, are to be so strictly measured and limited by the practice which actually prevailed at the time of the Union, they will be reduced to the condition of a 'natural right,' which 'does not want any legislation to protect it.' Such a right, it was said, cannot be called a privilege in any proper sense of the word. If that be so, the only result is that the protection which the Act purports to extend to all rights and privileges existing 'by practice' has no more operation that the protection which it purports to afford to rights and privileges existing 'by law.' It can hardly be contended that, in order to give a substantial operation and effect to a saving clause expressed in general terms, it is incumbent upon the Court to discover privileges which are not apparent of themselves, or to ascribe distinctive and peculiar features to rights which seem to be of such a common type as not to deserve special notice or require special protection."[55]

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[51] See *supra*, pp. 636-9.

[52] See *supra*, p. 640.

[53] [1892] A. C. 445, at pp. 452-3.

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[54] At p. 454.

In their subsequent judgment in *Brophy* v. *Attorney-General of Manitoba*,[56] their lordships refer to their previous decision in *Barrett's* case, and say: "It is true that the construction put by this Board upon the first sub-section reduced within very narrow limits the protection afforded by that sub-section in respect of denominational schools. It may be that those who were acting on behalf of the Roman Catholic community in Manitoba, and those who either framed or assented to the wording of that enactment, were under the impression that its scope was wider, and that it afforded protection greater than their lordships held to be the case. But such considerations cannot properly influence the judgment of those who have judicially to interpret a statute."

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[55] See, also, *supra*, pp. 636-9.

[56] [1895] A. C. 202.

And so, as their lordships say in the *Brophy* case: "In *Barretts' case,*[57] the sole question raised was, whether the Public Schools Act of 1890 prejudicially affected any right or privilege which the Roman Catholics, by law or practice, had in the province *at the Union.* Their lordships arrived at the conclusion that this question must be answered in the negative. The only right or privilege which the Roman Catholics then possessed, either by law or in practice, was the right or privilege of establishing and maintaining for the use of members of their own Church, such schools as they pleased. It appeared to their lordships that this right or privilege remained untouched, and, therefore, could not be said to be affected by the legislation of 1890." "Notwithstanding the Public Schools Act, 1890," say their lordships in the *Barrett* case,[58] "Roman Catholics and members of every other religious body in Manitoba are free to establish schools throughout the province; they are free to maintain their schools by school fees or voluntary subscriptions; they are free to conduct their schools according to their own religious tenets without molestation or interference. No child is compelled to attend a public school.

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[57] [1892] A. C. 445.

[58] [1892] A. C. 445, at pp. 457-8.

No special advantage other than the advantage of a free education in schools conducted under public management is held out to those who do attend. But then it is said that it is impossible for Roman Catholics, or for members of the Church of England to send their children to public schools where the education is not superintended and directed by the authorities of their Church, and that, therefore, Roman Catholics and members of the Church of England who are taxed for public schools, and, at the same time, feel themselves compelled to support their own schools, are in a less favourable position than those who can take advantage of the free education provided by the Act of 1890. That may be so. But what right or privilege is violated or prejudicially affected by the law? It is not the law that is in fault. It is owing to religious convictions which everybody must respect, and to the teaching of their Church, that Roman Catholics and members of the Church of England find themselves unable to partake of advantages which the law offers to all alike.''

Sub-section 2 of section 22 of the Manitoba Act.—Proceeding now to sub-section 2, we note that it is identical with sub-section 3 of section 93 of the British North America Act, except that, in the first place, the introductory words of the latter section—' Where in a province a system of separate or dissentient schools exists by law at the Union, or is thereafter established by the legislature of the province,'—are omitted; and, in the second place, the Manitoba section reads ' from any act or decision of the legislature of the province, or of any provincial Authority,' instead of simply, ' from any act or decision of any provincial Authority.' And it is in view of this, and other distinctions, between the words of section 22 of the Manitoba Act, and section 93 of the British North America Act, that, as we have seen, the Privy Council in *Brophy* v. *Attorney-General of Manitoba,*[59] come to the conclusion that the one is intended to be a substitute for the other. We have also seen the general explanation of section 22 of the Manitoba Act given by their lordships in that case.[60] And with specific reference to the above distinctions between sub-section 2 of the one Act and sub-section 3 of the other, and especially to the omission from sub-section 2 of section 22 of the Manitoba Act of any reference to a system of separate or dissentient schools ' thereafter established by the legislature of the province ' their lordships say, in a later passage in the same judgment:[61] " The reason for the difference between the sub-sections is manifest. At the time the Dominion Act was passed a system of denominational schools adapted to the demands of the minority existed in some provinces, in others it might thereafter be established by legislation, whilst in Manitoba in 1870 no such system was in operation, and it could only come into existence by being ' thereafter established.' The words which preface the right of appeal in the Act creating the Dominion, would, therefore, have been quite inappropriate in the Act by which Manitoba became a province of the Dominion.''

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[59] [1895] A. C. 202. *Supra*, pp. 652-3.

[60] *Supra*, pp. 654-7.

[61] [1905] A. C. at p. 221.

Sub-section 2 of section 22 of the Manitoba Act (continued). Extends to rights and privileges acquired by legislation subsequent to the Union.—In the *Brophy case*,[62] the Privy Council so hold, saying that sub-section 2: "Extends in terms to 'any' right or privilege of the minority affected by an Act passed by the legislature, and would, therefore, seem to embrace all rights and privileges existing at the time when such Act was passed. Their lordships see no justification in putting a limitation on language so unlimited. There is nothing in the surrounding circumstances, or in the apparent intention of the legislature, to warrant any such limitation. Quite the contrary. It was urged that it would be strange if an appeal lay to the Governor-General in Council against an Act passed by the provincial legislature because it abrogated rights conferred by previous legislation, whilst if there had been no previous legislation, the Acts complained of would not only have been *intra vires,* but could not have afforded ground for any appeal. There is no doubt force in this argument, but it admits, their lordships think, of an answer.'' They then go on and give the general explanation of section 22 above noted.[63]

Sub-section 2 of section 22 of the Manitoba Act (continued). 'Affecting any right or privi-

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[62] *Ibid.* at p. 219.

[63] At p. 654.

lege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.'—As has already been stated,[64] in *Brophy* v. *Attorney-General of Manitoba,*[65] the Privy Council had to decide whether any right or privilege of the Roman Catholic minority in Manitoba, which accrued to them after the Union under statutes of that province, had been affected by the Manitoba Public Schools Act of 1890, and another provincial statute of the same year. At p. 226 of their judgment, after describing the position of the Roman Catholics of Manitoba under the Manitoba Schools Acts of 1871 and 1881, on the one hand, and under the Manitoba Public Schools Act, 1890, on the other hand, their lordships dispose of the question as follows: "Their lordships are unable to see how this question can receive any but an affirmative answer. Contrast the position of the Roman Catholics prior and subsequent to the Acts from which they appeal. Before these passed into law there existed denominational schools, of which the control and management were in the hands of Roman Catholics, who could select the books to be used and determine the character of the religious teaching. These schools received their proportionate share of the money contributed for school purposes out of the general taxation of the province, and the money raised for these purposes by local assessment was, so far as it fell upon Catholics, applied only towards the support of Catholic schools. What is the position of the Roman Catholic minority under the Acts of 1890? Schools of their own denomination, conducted according to their views, will receive no aid from the State. They must depend entirely for their support upon the contributions of the Roman Catholic community, while the taxes out of which State aid is granted to the schools provided for by the statute fall alike on Catholics and protestants. Moreover, while the Catholic inhabitants remain liable to local assessment for school purposes the proceeds of that assessment are no longer destined to any extent for the support of Catholic schools, but afford the means of maintaining schools which they regard as no more suitable for the education of Catholic children than if they were distinctively protestant in their character. In view of this comparison it does not seem possible to say that the rights and privileges of the Roman Catholic minority in relation to education which existed prior to 1890 have not been affected."

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[64] *Supra*, p. 632.

[65] [1895] A. C. 202.

Sub-section 3 of section 22 of the Manitoba Act.—The Privy Council, then, having held as just mentioned, observe with reference to the power of the Governor-General in Council under sub-section 3,[66]: "Their lordships have decided that the Governor-General in Council has jurisdiction, and that the appeal is well founded, but the particular course to be pursued must be determined by the authorities to whom it has been committed by the statute. It is not for this tribunal to intimate the precise steps to be taken.

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[66] [1895] A. C. at p. 228.

Their general character is sufficiently defined by the third sub-section of section 22 of the Manitoba Act. It is certainly not essential that the statutes repealed by the Act of 1890 should be re-enacted, or that the precise provisions of these statutes should again be made law. The system of education embodied in the Acts of 1890 no doubt commends itself to, and adequately supplies the wants of, the great majority of the inhabitants of the province. All legitimate ground of complaint would be removed if that system were supplemented by provisions which would remove the grievance upon which the appeal is founded, and were modified so far as might be necessary to give effect to these provisions." [67]

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[67] In a considered opinion of the late Mr. Christopher Robinson, given in 1895, a copy of which is in the writer's possession, and which had special reference to this decision of the Privy Council, the following passage occurs, and may be of interest: "It cannot I think be said that the mere fact of a right of the Roman Catholic or protestant minority in relation to education having been affected by provincial legislation entitles them in every case, and under all circumstances, to the restoration of such right, or to any relief. Their right is to appeal, but the result of such appeal must depend upon the judgment of the Governor-General in Council, and of the Dominion parliament, whose course would no doubt be determined by a sense of justice and right, and by a due regard to the letter and spirit of the Constitution in view of all the surrounding facts and circumstances in each particular case. The expressions of opinion of the Judicial Committee in the matter are in no legal sense binding upon members of the Dominion Government, or the parliament of Canada so far as any action to be taken by either is concerned. Both are at liberty to exercise their own discretion, and not the less because it is declared that a grievance exists. As I understand the judgment, it cannot be said strictly speaking to decide more than that the appeal will lie. The term 'grievance' when used in a judgment would, I take it, mean generally a wrong done which the law recognises as such, and affords some redress for. Here, I take it, it means the affecting of the rights and privileges of the Roman Catholic minority in relation to education so as to give the right of appeal provided by the statute."

CHAPTER XXVII.

AGRICULTURE AND IMMIGRATION.

Section 95 of the British North America Act enacts as follows:—

95. In each province the legislature may make laws in relation to agriculture in the province, and to immigration into the province; and it is hereby declared that the parliament of Canada may from time to time make laws in relation to agriculture in all or any of the provinces, and to immigration into all or any of the provinces; and any law of the legislature of a province relative to agriculture or to immigration shall have effect in and for the province as long and as far only as it is not repugnant to any Act of the parliament of Canada.

Accordingly in *In re Narain Singh*,[1] where a number of immigrants, who had been granted permission to land by the Dominion Immigration agent, under the provisions of the Dominion Immigration Act, were detained by the provincial authorities, and subjected to the test set out in the British Columbia Immigration Act of 1908; and having failed to stand this test, were charged with an infraction of the provincial Act, and convicted and sentenced to the limit provided,—on *habeas corpus* proceedings, the full Court held that the prisoners must be released, Hunter, C.J., with whom the other two judges concurred, saying (p. 480): "By sections 26 to 30 of the Dominion Immigration Act, Parliament has occupied the field; in sections 26 to 29 it has specially provided that certain classes shall be excluded, and it has delegated to the Governor in Council power to deal with all other immigrants, and, therefore, we have a complete code as to what class or classes of immigrants shall be admitted or excluded.'"[1a]

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[1] (1908) 13 B. C. 477. As to the meaning of the term 'immigration' see the Australian cases—*Attorney-General for the Commonwealth* v. *Ah Sheung* [1906] 4 C. L. R. 949; *Chia Gee* v. *Martin* [1905] 3 C. L. R. 649; *Ah Yin* v. *Chirstie* [1907] 4 C. L. R. 1428; *Potter* v. *Minahan* [1908] 7 C. L. R. 277; and an Article on the Legal Interpretation of the Constitution of the Commonwealth, by A. B. Keith, Jl. of Compar. Legisl., N. S., Vol. 11, pp. 239-42.

As Mr. Joseph Chamberlain, then Secretary of State for the Colonies, says in a despatch to Lord Minto of January 22nd, 1901,[2]: "The whole scheme of the British North America Act implies the exclusive exercise by the Dominion of all national powers, and, though the power to legislate for promotion and encouragement of immigration into the provinces may have been properly given to the provincial legislatures, the right of entry into Canada of persons voluntarily seeking such entry is obviously a purely national matter, affecting as it does the relation of the Empire with foreign States."

As to Agriculture in *Rex* v. *Horning*,[3] an Ontario Divisional Court held the provincial Act to prevent the Fraudulent Entry of Horses at Exhibitions (R. S. O. 1897, c. 254) which forbade, under penalties, entering for competition for any prize offered by any agricultural, or other Society, any horse under a false or assumed name or pedigree, or in a class different to that to which such horse properly belonged by the rules of the Society, *intra vires* as one in relation to agriculture. Boyd, C., delivering the judgment of the Court, says (p. 219: " Its " (*sc.* the Act's) " place and collocation is as to legislation touching matters of an agricultural character in which the raising and encouraging the breeding of good horses is an important element." In *Brooks* v. *Moore,*[3a] Morrison, J., held the Animal Contagious Diseases Act, 1903, *intra vires* of the Dominion under this section as relating to federal agriculture.

[1a] The power conferred upon the Governor-General in Council by the British Columbia Immigration Act to prohibit the landing of immigrants of a specific class, cannot be delegated to the Minister of the Interior: *In re Behari Lal* (1908) 13 B. C. 415.

[2] Provincial Legislation, 1899-1900, p. 139.

[3] (1904) 8 O. L. R. 215.

There remain certain reports of Ministers of Justice to notice in connection with this section. In a report of January 27th, 1894, on a certain Nova Scotia enactment relating to the immigration of paupers, Sir John Thompson expresses the opinion that it is *ultra vires* of a provincial legislature to pass an Act relating to immigration, Parliament having passed statutes in that regard.[4] In 1900 many despatches passed between the representatives of Japan and those of the Imperial and Dominion Governments in reference to certain British Columbia statutes passed in that year aiming at restricting and discouraging Japanese immigration into that province[5] In the result an Act prohibiting immigration into British Columbia of any immigrant, within the meaning of the Act, who when asked to do so should fail himself to write out and sign in the characters of some European language an application to the Provincial Secretary in the form set out in the schedule of the Act, imposing what is termed an educational test,—and an Act which provided in substance that as to works to be constructed or performed under provincial franchises conferred during or after the then present session of the provincial legislature, no employer should engage or employ any workman, who when asked to do so by a duly authorized officer, should fail to himself read in a language of Europe the Act in question, under penalties,—were disallowed in accordance with a report of the Minister of Justice, of January 5th, 1901.[6] The Minister observes that: "Parliament having undertaken to regulate immigration, and not having required any educational attainments from intending immigrants, in view of the objections raised by the Japanese consul, and other similar objections which may arise in the operation or administration of the Act, it would be inadvisable to leave this Act to its operation." It was in connection with this matter that Mr. Joseph Chamberlain wrote the Despatch above referred to.[7]

[3a] (1907) 13 B. C. 91.

[4] Prov. Legisl. 1867-1895, pp. 634-5.

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[5] These are to be found in Prov. Legisl. 1899-1900, at pp. 134-8.

[6] *Ibid.* at pp. 134-8.

[7] *Supra*, pp. 49, 668.

Again, in a report of December 27th, 1901, in reference to certain British Columbia statutes, the Minister of Justice says: " The subject of aliens is clearly within the exclusive authority of Parliament. Immigration, is also, within Dominion jurisdiction, and it has been, and is, the policy of your Excellency's Government to promote immigration, large sums of money being annually expended from the Dominion treasury to that end. The efforts of your Excellency's Government would, however, be certainly paralyzed if the immigrant, upon coming to Canada, is to find the way of employment closed to him by provincial legislation. The policy of these enactments is so contrary to that of your Excellency's Government, and the enactments themselves so manifestly *ultra vires,* that the undersigned considers no course is open to your Excellency's Government, consistently with the public interest, but the exercise of the power of disallowance, unless, indeed, the provincial legislature repeal these provisions.[8] Disallowance, however, became unnecessary as the provincial authorities agreed to make the necessary amendments.[9]

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[8] Prov. Legisl. 1901-1903, p. 64.

[9] *Ibid.* at pp. 74-75.

CHAPTER XXVIII.

DOMINION COURTS.[1]

Section 101 of the British North America Act provides as follows:—

101. The parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada.

The purport of this section was very recently exhaustively discussed upon the argument before the Privy Council in respect to the validity of the provisions of the Dominion Supreme Court Act authorizing the Governor-General in Council to obtain by direct request answers from the Supreme Court of Canada on questions both of law and fact.[2] What their lordships actually decided in this case was that for the Dominion parliament so to legislate under the general residuary power to make laws for the peace, order, and good government of Canada upon non-provincial subjects is not repugnant, as alleged, to this section. " The provinces by their Counsel," to quote the words of the judgment (at p. 584) " say that when a Court of

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[1] As to provincial Courts, see *supra*, pp. 525-573.

[2] *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1912] A. C. 571.

Appeal from all the provincial Courts is authorized to be set up, that carries with it an implied condition that the Court of Appeal shall be in truth a judicial body, according to the conception of judicial character obtaining in civilized countries, and especially obtaining in Great Britain, to whose constitution the constitution of Canada is intended to be similar, as recited by the British North America Act, 1867. And they say that to place (*sic*) the duty of answering questions, such as the Canadian Act under consideration does require the Court to answer, is incompatible with the maintenance of such judicial character, or of public confidence in it, or with the free access to an unbiassed tribunal of Appeal to which litigants in the provincial Courts are of right entitled. This argument in truth arraigns the lawfulness of so treating the Court upon the ground that a Court liable to be so treated ceases to be such a judiciary as the Constitution provides for. . . . If, notwithstanding the liability to answer questions, the Supreme Court is still a judiciary within the meaning of the British North America Act then there is no ground for saying that the impugned Canadian Act is *ultra vires.*" And their lordships held in favour of the validity of the Act, mainly upon the ground, to cite again their own language, that "a contrary view, now said to menace the very essence of justice, has been tranquilly acted upon without question by the legislatures of the Dominion and provinces, by the Courts in Canada, and by the Judicial Committee, ever since the British North America

Act established the present Constitution of Canada.'"[3] Their lordships, then, holding that the Dominion Act in question was not repugnant to the provisions of section 101 in respect to the constitution of a general Court of Appeal for Canada, and it not being seriously contended that it was repugnant to any other section of the British North America Act, this was decisive, in view of the established principle, which they reiterate, that the powers distributed between the Dominion, on the one hand, and the province, on the other hand, "cover the whole area of self-government within the whole area of Canada,'"[4] and the Act was certainly not within provincial powers. The verbatim report, however, of the most able and instructive argument before their lordships in this case has been published,[5] and as Sir Robert Finlay of Counsel for the appellant provinces discussed the whole section now under consideration, the following extract from his argument may be found of value: "I desire to submit to your lordships, broadly, that the whole powers of the parliament of Canada with regard to the Supreme Court are contained in section 101, and that these references are inconsistent with the duties of the Supreme Court as prescribed in section 101. It is a general Court of Appeal for Canada. It cannot be pretended that it" (*sc.* the Dominion Act in question) "comes under that. It is not an appeal from any Court in the provinces. 'For the establishment of any additional Courts, for the better administration of the laws of Canada '— I submit it cannot come under that. In the first place, it is not the administration of law at all; in the second place it is not the administration of the law of Canada so far as it relates to provincial questions.[6] The administration of law means dealing with matters in the due course of law when they arise in a suit. A concrete question arises in a suit; that is dealt with; the administration of the law proceeds on such lines as these, and only on such lines. This is asking that the Supreme Court shall write a sort of treatise on a very great number of questions which it is apprehended may arise under the Constitution. That is not the administration of the law at all. Secondly, even if the first difficulty could be got over, and it could be considered as in some way falling under the head of administration of the law, which I submit is not the case, it certainly would not be the administration of the laws of Canada. The 'laws of Canada ' in this section means the law of the Dominion as a whole;[7] it does not mean the law of the various provinces which form the Dominion, and the references here relate very largely to the question of the provincial laws, and the power of the provincial legislatures, and of the provincial Governments, with regard to the incorporation of companies and other matters. So that, on both these grounds, I submit that it cannot fall within this second limb of section 101. But I go further: I respectfully submit that section 101 shows that the Supreme Court was to be a Court and a Court only, and that to cast upon it such advisory functions as the Supreme Court purports to throw upon it, is inconsistent with the duties of a Court.[8]" Again he says, (p. 84): " The proper administration of the law means administering it when the point arises judicially in the course of the law, and it does not, because it has a reference to the law which is to be afterwards administered, in the slightest degree follow that this question or answer is in the course of its administration." And later on the following occurs, (p. 126) :—

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[3] At p. 588.

[4] See *supra*, pp. 94-6; 121.

[5] Printed by Wm. Briggs, Toronto, 1912.

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[6] The Dominion Act expressly authorises the reference of questions 'touching the constitutionality or interpretation of any Dominion or provincial legislation,' or 'any other matter whether or not in the opinion of the Court, *ejusdem generis*' with matters expressly enumerated, or not.

[7] In another place in his argument, (p. 11), Sir Robert Finlay says: "The power to establish additional Courts for the better administration of the laws of Canada cannot be exercised with regard to the 'better administration' of any provincial law; that branch of the section relates to such Courts as Admiralty Courts, the Exchequer Court, the Railway Board, and Courts for the trial of election petitions, with regard to elections to the Dominion legislature." But see *infra*, pp. 685-8.

Lord Robson: " And I suppose what you say is, if you make it more than a Court of Appeal, and give it extra judicial functions, you are making something else? "

Sir Robert Finlay: " Yes, and it approaches its judicial functions in fetters."

Lord Macnaghten: " You say it should be a Court of Appeal unbiassed by any expression of opinion? "

Sir Robert Finlay: " Just so, my Lord."

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[8] Printed Argument: pp. 15-16.

And referring to the words ' notwithstanding anything in this Act ' contained at the beginning of section 101, Sir Robert Finlay says, (p. 129), that he takes it, they " have reference almost entirely to the provision that the provincial legislature shall have exclusive authority with regard to the administration of justice in the province.[9] It might be supposed to interfere with that if you created a Court of Appeal from the provinces,—it would in fact." [10]

Now so far as these extracts from the argument before the Privy Council refer to the latter part of section 101 which enables Parliament to provide for the establishment of 'additional Courts for the better administration of the laws of Canada,' we shall refer again to the subject of the interpretation of these words in the section, but it seems well to deal briefly first with the general subject of references to the Supreme Court by the Governor-General in Council.

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[9] No. 14, of section 92, discussed *supra*, pp. 525-573.

[10] In the argument here referred to the appellants in vain referred to the fact that section 101 falls under a part of the British North America Act, which has the general heading or title 'Judicature.' They also referred to the supposed analogy of the position of the Supreme Court of the United States, which Chief Justice Marshall held had nothing but judicial functions. But as Mr. Atwater, of counsel for the Attorney-General of Canada, observes, (p. 184): "The Supreme Court in regard to Canada cannot in any way be assimilated to the position of the Supreme Court in the United States. There there is a constitutional right on the part of the different States to have a Supreme Court, and it was one of the essential features of the Act by which the original States of the Union came together, when they agreed to part with a certain amount of their legislative power, each to a central authority, that they stipulated as part of the bond that an appellate Court should be established, and that as part of the Constitution was established, and it was in connection with the character of that Court, that, I submit, Chief Justice Marshall was induced to give the ruling he did—that they had nothing but judicial functions. If that argument was applicable to the Supreme Court of Canada, I could quite understand your lordships' proposition, that it would be to a certain extent depriving the provinces of the advantage of having an appellate Court which was provided for by the Constitution. But it is not provided for by the Constitution. All that the Constitution says under this head in giving these powers is that the parliament of Canada '*may* from time to time provide for the Constitution . . . of a general Court of Appeal for Canada.'"

References to the Supreme Court by the Governor-General in Council.—The right, then, of the Dominion parliament to authorise the reference to the Supreme Court of any question of law, or fact, is now finally established, notwithstanding the above arguments, and the further arguments advanced especially in the Court below,[11] that Parliament cannot impose upon the Supreme Court the duty of answering questions which do not apply to legislation actually passed, or to legislation which it is intended shall be passed; and that for the Dominion parliament to authorise such reference in respect to provincial legislation is in conflict with item 14 of section 92, whereunder provincial legislatures may exclusively make laws in relation to 'the administration of justice in the province, including the constitution, maintenance and organization of provincial Courts, both of civil and criminal jurisdiction and including procedure in civil matters in those Courts.'[12] Nor has the remonstrance of Idington, J.,[13] availed anything, where he asks: " Can Parliament constitute this Court a tariff commission, a civil service commission, a conservation commission, a department for the management of any of the affairs of State, or an adjunct to any of the departments discharging such duties, or an advisory adjunct to the provincial Courts.'"[14] Obviously, also, the construction put by Taschereau, J., on the Dominion statute then in force authorising such references, 54-55 Vict. c. 25, s. 4, in *In re Provincial Fisheries,*[15] whereby he held that the Court " could not be called upon to determine what was the law in any of the provinces before Confederation," has no application to the present enactment, R. S. O. 1906, c. 139, s. 60, which expressly excludes the rule of *ejusdem generis* on which he relied.

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[11] (1910) 43 S. C. R. 536. In *In re* Legislation respecting Abstention from Labour on Sunday (1905) 35 S. C. R. 581, the Supreme Court held that under the then existing Act, 54-55 Vict. c. 25, s. 4, D, the Governor-General in Council could not refer to the Supreme Court supposed or hypothetical legislation which the legislature of a province might enact in the future. 6 Edw. VII., c. 50, s. 2, was then enacted covering the point.

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[12] The opinions of the judges in response to such references are not binding on the Governor-General in Council, or on the judges of the Supreme Court themselves, "if at any time it is called upon in its strictly judicial capacity to decide the very question asked," or upon the judges of any of the provincial Courts: S.C. 43 S. C. R., at pp. 550, 561, 588, 592. And see as to this, also, per Maclaren, J.A., in *The King* v. *Brinkley* (1907), 14 O. L. R., at pp. 448-452. In *Kerley* v. *London and Lake Erie Transportation Co.* (1912) 26 O. L. R. 588, Boyd, C., refused to be bound by the answers of the Supreme Court on one head of the submissions to them in *In re* Legislation respecting Abstention from Labour on Sunday, (1905) 35 S. C. R. 581.

[13] S. C., 43 S. C. R. at p. 581.

[14] In his report to the Governor-General of July 13th, 1889, in regard to the petition presented to the latter for the reference of the Jesuit Estate Act to the Supreme Court of Canada, Sir John Thompson, then Minister of Justice, reviews the different precedents for such references, and also for similar references, in England, by the Government to the Judicial Committee of the Privy Council, arriving at the conclusion that the object and scope of the enactments allowing such references are "not to obtain a settlement, by this summary procedure, of legal questions even of great public interest, or to obtain an adjudication upon private rights, but solely to obtain advice which is needed by the Crown in affairs of administration:" Prov. Legisl. 1867-1895, pp. 423-4. See, also, Todd's Parl. Gov. in Brit. Col., 2nd ed. at p. 539 *seq.*, and pp. 605-6; Doutre's Constitution of Canada, p. 348. The following interesting passage as to the practice in England occurs in the judgment of the Privy Council (*Attorney-General for Ontario* v. *Attorney-General for Canada*, [1912] A. C. at p. 586): "Very little assistance is afforded by the almost or altogether obsolete practice of His Majesty's judges in England being questioned by the Crown as to the state of the law, if indeed, it can be said that there was

References to the Supreme Court. Hypothetical questions.—In like manner the present enactment provides that ' it shall be the duty of the Court to answer each question so referred;' and that the ' Court shall certify to the Governor in Council . . . its opinion upon each such question, with the reasons for each such answer . . . and any judge who differs from the opinion of the majority shall in like manner certify his opinion and his reasons.' It will no longer, therefore, it is respectfully submitted, be open to judges of the Supreme Court to refuse to answer questions on the ground of

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ever any legitimate practice of that kind. Since 1760, when Lord Mansfield on behalf of His Majesty's judges did furnish an answer, though with evident reluctance, as to the Crown's right to summon Lord George Sackville before a Court Martial, no instance of such a proceeding has been adduced. Earlier practice is of no weight, and as the unwritten Constitution of England is a growth, not a fabric, it may be that desuetude for 150 years has rendered unconstitutional, in the sense in which that term is understood, in England, any attempt to repeat such an experiment. If the point ever arises, it must be settled upon the judges of England either assenting or refusing to comply with the request. It will then be a question what is the duty appertaining to their office, which is a very different question from that now before the Board."

[15] (1896) 26 S. C. R. at p. 540.

their hypothetical character,[16] or any other ground. And so in the argument before the Privy Council, in respect to this Dominion Act,[17] Lord Loreburn, L.C., says: " My difficulty is not in seeing that there is power to ask particular questions, or power to make and authorise them to be asked, but my difficulty is to see where, consistently with the statute, you leave to the judges the right to say: ' We do not decline the duty; we recognize the duty, but we think in this particular question, on this particular point of fact or law, it would be inconsistent with the administration of justice to answer it.' . . . I do not see under the statute that there is any loop-hole left to the judges to refuse." But in their judgment their lordships observe that the Supreme Court can either point out in its answer,[18] that the Act has resulted in asking a series of searching questions very difficult to answer exhaustively and accurately without so many qualifications and reservations as to make the answers of little value," or " other considerations of a like kind, or can make the necessary representations to the Governor-General in Council when it thinks right so to treat any question that might be put. And the parliament of Canada can control the action of the Executive."

All this, however, it is almost needless to point out has no application to the Judicial Committee of the Privy Council, which no Act of the parliament of Canada can bind; and in the Lord's Day Act case,[19] their lordships refused to give "speculative opinions on hypothetical questions." These questions related to whether the Ontario legislature had power to prohibit certain kinds of worldly labour, business, or work on the Lord's Day within the province; and as to the proper construction of certain sections of the Ontario Lord's Day Act, R. S. O. 1897, c. 246. At p. 529, their lordships say: "With regard to the remaining questions, which it has been suggested should be reserved for further argument, their lordships are of the opinion that it would be inexpedient and contrary to the established practice of this Board to attempt to give any judicial opinion upon these questions. They are questions proper to be considered in concrete cases only; and opinions expressed upon the operation of the sections referred to, and the extent to which they are applicable, would be worthless for many reasons. They would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient, and inexpedient, that opinions should be given upon such questions at all. When they arise, they must arise in concrete cases, involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down, and over-ride the operation of particular words when the concrete case is not before it.'"[20]

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[16] As was done by the Supreme Court in *In re Legislation respecting Abstention from Labour on Sunday* (1905), 35 S. C. R. 581. See *supra*, p. 678, n.

[17] [1912] A. C. 571. Printed Argument at p. 189.

[18] [1912] A. C. at p. 589.

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[19] *Attorney-General for Ontario* v. *Hamilton St. R. W. Co.*, [1903] A. C. 524.

Appeal to Supreme Court need not be from provincial Courts of last resort only. — *In re Grand Trunk R. W. Co. et al.,*[21] Taschereau, J., held, in the Supreme Court, that section 101 of the British North America Act gives the Dominion parliament power to grant an appeal from provincial Courts of last resort only. But the Court has now in *L'Association St. Jean Baptiste* v. *Brault,*[22] decided otherwise, upholding the Dominion Act, 54-55 Vict. c. 25, which authorises appeals from the Superior Court sitting in review in the province of Quebec.[23] It is to be noticed further, that provincial legislatures cannot take away, or impair, the jurisdiction conferred upon the Supreme Court by the Supreme Court Act. And so in *Crown Grain Co.* v. *Day,*[24] the Privy Council held that the Manitoba Mechanics and Wage Earners Lien Act (R. S. M. c. 110, s. 36) which enacted that in suits relating to liens, the judgment of the Manitoba Court of King's Bench should be final, and that no appeal should lie therefrom, was *ultra vires,* as the provincial Act could not circumscribe the appellate jurisdiction granted to the Supreme Court by the Dominion parliament, acting under section 101 of the British North America Act, ' from any final judgment of the highest Court of final resort now or hereafter established in any province of Canada.' Their lordships say, (p. 507) : "It is to be observed that the subject in conflict belongs primarily to the subject-matter committed to the Dominion parliament, namely, the establishment of the Court of Appeal. But, further, let it be assumed, that the subject-matter is open to both legislative bodies, if the powers thus overlap, the enactment of the Dominion parliament, must prevail.'"[25]

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[20] *Cf.* per Osler, J.A., in the Ontario Court of Appeal, S. C. 1 O. W. R. at pp. 314-315. Again in the *Fisheries Case, Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces*, [1898] A. C. 700, the Privy Council declined to answer the last question, which was—'Had riparian proprietors, before Confederation, an exclusive right of fishing in non-tidal lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown'—saying (at p. 717): "Their lordships must decline to answer the last question submitted as to the rights of riparian proprietors. These proprietors are not parties to this litigation or represented before their lordships, and accordingly their lordships do not think it proper when determining the respective rights and jurisdictions of the Dominion and provincial legislatures to express an opinion upon the extent of the rights possessed by riparian proprietors." This seems as good a place as any to note that in *Re Klondike City Townsite* (1906), 5 W. L. R. 526, at p. 531, Macaulay, J., remarked that he did not believe that the Yukon Council, or the Commissioner of the Yukon Territory, had the power to submit to the Territorial Court of the Yukon Territory for hearing and consideration questions affecting the administration of federal affairs; nor that any judgment that Court could give under such submission would be effective if it attempted to deal with the administration of the Crown Lands of the Federal Government. See also per Dugas, J., S. C. at p. 529, and Craig, J., at pp. 530-1.

[21] Doutre's Constitution of Canada, at pp. 337-9.

[22] (1901) 31 S. C. R. 172.

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[23] Taschereau, J., delivering the judgment of the Court in this case, points out that the power to constitute a General Court of Appeal for Canada in section 101 is not to be restricted by applying to it the subsequent words of the section—'for the better administration of the laws of Canada.'

[24] [1908] A. C. 504, 39 S. C. R. 258.

[25] See, also, *City of Halifax* v. *McLaughlin Carriage Co.* (1907), 39 S. C. R. 175. So in *Union Colliery Co.* v. *Attorney-General of British Columbia* (1897) 17 C. L. T. 391 (not appar-

'Any additional Courts for the better administration of the laws of Canada.'—It remains now to deal with the concluding words of section 101, which enable the Dominion parliament to establish 'any additional Courts for the better administration of the laws of Canada.' We have seen the construction which Sir Robert Finlay sought to put on these words in the recent argument before the Privy Council in *Attorney-General for Ontario* v. *Attorney-General for Canada*:[26] but, for reasons already indicated,[27] their lordships did not find it necessary to deal with this part of the section. As to Sir Robert's contention that 'administration of the law' means 'dealing with matters in the due course of law when they arise in a suit,' and that only, the point does not appear to have been raised elsewhere, and the only remark which suggests itself is that the clauses of the British North America Act conferring legislative powers, must be construed in a liberal, and not in a rigidly technical manner.[28] The other point, however, raised by Sir Robert Finlay, namely, that 'by the laws of Canada' are meant "the laws of the Dominion as distinguished from the laws of the provinces,"

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ently reported elsewhere) it was held by the Supreme Court of British Columbia that provincial legislatures have no jurisdiction to grant an appeal to the Supreme Court. See, too, report of Minister of Justice of November 2nd, 1897, on Ontario legislation: Hodgins' Prov. Legisl. 1896-8, p. 4. On the other hand the Dominion parliament under this section has power to give an appeal even in a case in which the legislature of a province has especially denied it: *Danjou* v. *Marquis* (1879), 3 S. C. R. 251, per Henry, J., at pp. 268-9, per Fournier, J., at p. 264.

[26] [1912] A. C. 571. *Supra*, pp. 673-6.

[27] *Supra*, pp. 672-4.

[28] *Supra*, pp. 17-19.

calls for further consideration. In the course of the argument itself, on Sir Robert Finlay so contending, Lord Macnaghten is reported as observing: "Is that so very clear? I am not quite sure about that. I should have thought the 'laws of Canada' might embrace the laws of the several provinces too." And the view that this is so seems clearly to have been held in the Court below.[29] At the same time, Davies, J., seems to think that 'laws of Canada' primarily means 'Dominion Acts and powers;' and so does Idington, J. (at pp. 571, 575). But are not all laws operative in Canada 'laws of Canada'? It is submitted that they are, and in this connection section 4 of the British North America Act may be referred to which provides that in the subsequent provisions of that Act, 'unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under this Act;' as may, also, the judgment of the Privy Council in *Prince Edward Island* v. *Attorney-General for the Dominion of Canada,*[30] where their lordships say in reference to section 4: "Under the scheme of the Act the Dominion was not constituted by the immediate operation of the Act itself. The territory included in the four original provinces was incorporated by proclamation issued under the authority of section 3. The territory included in the provinces subsequently incorporated was admitted by Orders in Council issued under section 146. In their lordships' opinion all these provinces equally form part of Canada as constituted under the Act.''[31] And so a writer in the Canadian Law Times, in an Article on the Constitution of Canada,[32] expresses the view that by the ' laws of Canada ' in section 101, must be understood not merely laws passed by the Dominion parliament, but ' laws in force in Canada whether originating at common law, in the Imperial or Canadian parliaments, or provincial legislatures.'[33]

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[29] (1910) 43 S. C. R. 536.

[30] [1905] A. C. 37.

One or two decisions remain to be noticed. In *Gaynor* v. *Lafontaine*,[34] it was held that by virtue of sections 101 and 132 [35] of the British North America Act, the Dominion Government had the constitutional power to establish a Court presided over by a Commissioner named for that purpose to apply the laws relating to extradition.

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[31] For a statement by the Privy Council of certain of the circumstances connected with the admission of each of the new provinces into the Dominion: see S. C. at pp. 45-47.

[32] 11 C. L. T. at p. 147. The writer cites in support the remarks of the Judicial Committee on the motion for leave to appeal in *McLaren* v. *Caldwell* as reported 3 C. L. T. 343, *q.v.*

[33] See, however, *Ryder* v. *The Queen* (1905), 36 S. C. R. 462. See also as to this section *Farwell* v. *The Queen* (1887), 14 S. C. R. 392, where it was held that under it the Dominion parliament has power to give jurisdiction to the Exchequer Court in actions when the Crown in right of the Dominion is plaintiff or defendant; also *Forristal* v. *McDonald* (1882) Cass. Sup. Ct. Dig. 406; *Clarkson* v. *Ryan* (1890), 17 S. C. R. at pp. 253-4. The distinction between creating a new Court and conferring a new jurisdiction upon an existing Court is but a verbal and nonsubstantial distinction: *In re References by the Governor-General in Council* (1910), 43 S. C. R. at p. 552; also S. C. at p. 569, where Idington, J., thinks "the words 'additional Courts' are relative to the existing provincial Courts administering the laws of Canada as well as of the provinces." As to the words in question having reference to the establishment of Courts other than a general Court of Appeal, see *St. Jean Baptiste* v. *Brault* (1901), 37 C. L. J. 27.

[34] (1904) R. J. Q. 14 K. B. 99.

[35] See Appendix of Statutes and Orders in Council.

Jurisdiction of a Dominion Court may be limited to a single province.—In the case of *The Picton,*[36] the Supreme Court unanimously affirmed the validity of the Dominion Act constituting the Maritime Court of Ontario, although it was contended that as a Dominion Court its jurisdiction could not properly be limited to one province, the judgment of the Court resting upon the Dominion powers over 'navigation and shipping,' and 'the regulation of trade and commerce' in conjunction with the power by section 101 to establish Courts for the better administration of the laws of Canada.' Ritchie, C.J., dismissed the opposing contention as not arguable, and said: "You might as well contend that the Exchequer Court Act is *ultra vires* because some parts are only applicable to one province.[37]

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[36] (1879) 4 S. C. R. 648.

[37] As to whether provincial Courts created by local legislatures can, as such, have jurisdiction to interfere with the decisions of a Dominion tribunal, such as the Minister of Agriculture in the case of patents, see *In re Bell Telephone Co.* (1885), 9 O. R. 339, at p. 346. As to the Courts not enforcing an *ultra vires* order of such a tribunal, see *Re Canadian Pacific R. W. Co. and County and Township of York* (1896), 27 O. R. at p. 570.

CHAPTER XXIX.

PROPERTY PROVISIONS OF THE BRITISH NORTH AMERICA ACT.

The provisions of the British North America Act dealing with the distribution of public property and revenues between the Dominion, on the one hand, and the provinces, respectively, on the other, are to be found in Part VIII. of the Act, comprising sections 102 to 126, with the caption 'Revenues, Debts, Assets, Taxation.' We shall have to discuss here, especially, sections 108 and 109.

Section 108 with the Third Schedule referred to in it, is as follows:—

108. The public works and property of each province, enumerated in the third schedule to this Act, shall be the property of Canada.[1]

THE THIRD SCHEDULE.[2]

Provincial Public Works and Property to be the Property of Canada.

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[1] By section 125 of the British North America Act—'No lands or property belonging to Canada or any province shall be liable to taxation.' As to whether, and when, Dominion Crown lands become subject to provincial taxation before patent issued, see *supra*, pp. 414-7.

[2] Counsel for the provinces in their argument before the Privy Council in *St. Catharines Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. p. 50, are reported as stating that "as to legislative powers, it is the residuum which is left to the Dominion; as to proprietory rights the residuum goes to the provinces. Where property is intended to go to the

1. Canals, with lands and water power connected therewith.[3]
2. Public harbours.
3. Lighthouses and piers, and Sable Island.[3]
4. Steamboats, dredges, and public vessels.
5. Rivers and lake improvements.
6. Railways and railway stocks, mortgages, and other debts due by railway companies.
7. Military roads.
8. Custom houses, post offices, and all other public buildings, except such as the Government of Canada appropriate for the use of the provincial legislatures and governments.
9. Property transferred by the Imperial Government, and known as ordnance property.[3]
10. Armouries, drill sheds, military clothing, and munitions of war, and lands set apart for general public purposes.[3]

Dominion it is specifically granted, even though legislative authority over it may have already been vested in the Dominion." And this seems correct. See, however, per Strong, J., S. C. 13 S. C. R. at p. 605. Schedule 3 consists "of public undertakings which might be fairly considered to exist for the benefit of all the provinces federally united, of lands and buildings necessary for carrying on the customs or postal service of the Dominion, or required for the purpose of national defence, and of 'lands set apart for general public purposes.' It is obvious that the enumeration cannot be reasonably held to include Crown Lands which are reserved for Indian use: " *St. Catharines Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. at p. 56. As to Indian lands, see *infra*, pp. 710-721. In the *Fisheries* case, [1898] A. C. at pp. 710-11, their lordships remark that the subjects comprised in this Schedule "are for the most part works or constructions which have resulted from the expenditure of public money, though there are exceptions."

[3] See *infra*, pp. 692, n.; 704.

'Public harbours.' The foreshore.—In the *Fisheries* case,[4] the Privy Council have construed these words. They say (at pp. 711-712):—"With regard to public harbours their lordships entertain no doubt that whatever is properly comprised in this term became vested in the Dominion of Canada. The words of the enactment in the third schedule are precise. It was contended on behalf of the provinces that only those parts of what might ordinarily fall within the term 'harbour' on which public works had been executed became vested in the Dominion, and that no part of the sea did so. Their lordships are unable to adopt this view.[5] The Supreme Court, in arriving at the same conclusion, founded their opinion on a previous decision in the same Court in *Holman* v. *Green,*[6] where it was held that the foreshore between high and low water-mark on the margin of the harbour became the property of the Dominion as part of the harbour. Their lordships think it extremely inconvenient that a determination should be sought of the abstract question, what falls within the description 'public harbour.' They must decline to attempt an exhaustive definition of the term applicable to all cases. To do so would, in their judgment, be likely to prove misleading and dangerous. It must depend, to some extent, at all events, upon the circumstances of each particular harbour, what forms a part of that harbour. It is only possible to deal with definite issues which have been raised. It appears to have been thought by the Supreme Court in the case of *Holman* v. *Green, supra,* that if more than the public works connected with the harbour passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low water-mark, being also Crown property, likewise passed to the Dominion. Their lord-

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[4] [1898] A. C. 700: reported below 26 S. C. R. 444.

[5] It might possibly have been thought that 'public harbours' meant harbours which had been or should be declared to be such by some executive act, some exercise of the *jus regium* as to harbours. See Chitty on the Crown, pp. 174-5; *Brown* v. *Reed* (1874), 2 Pugs, 206; and *Nash* v. *Newton*, per Allen, C.J., (1891), 30 N. B. at pp. 618-20. In *Attorney-General of British Columbia* v. *Esquimalt and Nanaimo R. W. Co.* (1900), 20 C. L. T. 268 (not apparently reported elsewhere) it was held by the Supreme Court of British Columbia that the minerals, (in this case, coal), under the waters and beds of Nanaimo harbour are the property of the Dominion. As to the harbour of St. John, New Brunswick, not being one of the public harbours which became the property of Canada hereunder, but vested in the Corporation of the City of St. John under the charter of that city granted in 1785, and ratified and confirmed by New Brunswick statute of 1786, see *St. John Gas Light Co.* v. *The Queen* (1895) 4 Ex. C. R. 326.

[6] (1881) 6 S. C. R. 707. In *Holman* v. *Green*, Ritchie, C.J., though he holds with the rest of the Court, that the soil of such public harbours as are referred to in schedule 3 of the Act became vested in the Dominion, says that it did so "as distinct from the franchise of a port, it being clear from Lord Hale

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'that the franchise of a port may be in one person and the ownership of the soil within the limits of the port in another.'" In the *Fisheries* case, in the Supreme Court, (1896) 26 S. C. R. at p. 564, Girouard, J., after concurring in the opinion that as proprietor of public harbours, "the Dominion became the owner of the soil and of the fisheries therein;" adds: "The same rule should be applied to canals, lighthouses, piers, Sable Island, ordnance property, lands set apart for general public purposes, and other public works enumerated in the 3rd schedule, and, also, lands or public property assumed by the Dominion for fortifications or for the defence of the country under section 117." But as to fisheries not necessarily constituting a part of a harbour, see *Young* v. *Harnish* (1904), 37 N. S. 213, noted *infra*, p. 699. Taschereau, J. (26 S. C. R. at pp. 538-9), asks the question whether there are any private harbours?

ships are of opinion that it does not follow that because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may, or may not, do so, according to circumstances. If, for example, it had actually been used for harbour purposes, it would no doubt form part of the harbour; but there are other cases in which, in their lordships' opinion, it would be equally clear that it did not form part of it."

And their lordships cite this passage again in *Attorney-General of British Columbia* v. *Canadian Pacific R. W. Co.,*[7] and apply it to the case before them, in which they held that the foreshore in question had been sufficiently proved to be part of a public harbour, and that the Dominion parliament had power to legislate in regard to it. In the Court below,[8] Hunter, C.J., says: "In my opinion the British North America Act assigns public harbours to the Dominion, not so much *qua* property or land, as *qua* harbour; (*i.e.,* it was rather a transfer of jurisdiction than of property). The public works forming part of a public harbour, as well as the bed of a harbour, are, and always have been, vested in the Crown, and it was no doubt considered advisable, if not actually necessary, to transfer the jurisdiction, executive and legislative, over public harbours to the Dominion, as ancillary to the proper exercise of its powers relating to shipping and navigation. The jurisdiction in my opinion is latent, and attaches to any inlet or harbour as soon as it becomes a public harbour, and is not confined to such public harbour as existed at the time of the Union.'"[9]

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[7] [1906] A. C. 204, at p. 209.

[8] 11 B. C. 289, at p. 296.

In *Kennelly* v. *Dominion Coal Co.*,[10] Townshend, J., delivering the judgment of the Supreme Court of Nova Scotia, after referring to the words of the Privy Council judgment in the *Fisheries* case above quoted, as to the foreshores of public harbours forming, or not forming, part of the harbours according to circumstances, says: "One of the tests suggested in the Privy Council judgment is usage for commercial purposes, such as anchoring ships or loading goods. There is no intimation, however, that such are to be the only tests. Everything I should judge, which would go to show that the *locus* was adopted for commercial usage, and, in the course of time, when commercial necessity commanded it, could be so used, should be regarded in coming to a conclusion on the subject." And so he says of the *locus in quo* in that case, which was an action for damages to a water-lot in Sydney Harbour, the plaintiff's title being derived under a provincial Crown grant: "It would appear that while, up to the present, very little, if any, use has been made of the harbour as far south as the *locus,* and that such wharves as have been built were merely for private use, yet the harbour is there quite navigable and suitable for shipping and trade purposes, and that, with the growing importance of such a town as Sydney, when the time comes, the shore and water there will be required by the public in conducting its general business. Now in adjudicating on a question of this kind, we should be governed by a broad general view of the whole situation. Regarded from that standpoint, I cannot doubt that the *locus* of the alleged trespass is in Sydney harbour, and vested in the Dominion as representing the Crown."

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[9] So far as the writer knows, this is the only judicial dictum reported on this last important point, except that in *Nash* v. *Newton* (1891), 30 N. B. 610, Allen, C.J., says of a body of water there in question (p. 618): "It became then a harbour in fact, whether it had ever been so before or not."

[10] (1904) 36 N. S. 495, at p. 500.

Upon the argument in *Attorney-General for British Columbia* v. *Canadian Pacific R. W. Co.,*[11] Mr. C. A. Russell, of Counsel for the province, says, in reference to the foreshore of the public harbour there in question: " Mr. Justice Duff seems to have acted upon the view, which I submit is an erroneous view, that, if you find any portion of the foreshore used, indiscriminately, for the purpose of landing in small boats, that is a user for harbour purposes such as would satisfy the conditions which must be complied with in order to show that the soil and the proprietary rights in the foreshore would pass from the province to the Dominion. I submit that this is going very much further than can possibly be right. There is certainly no authority to warrant any such proposition as that. The question which is, as I understand, proposed in the *Fisheries* case, is whether there has been a use of the foreshore for harbour purposes."

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[11] [1906] A. C. 204. See *supra*, p. 343. Transcript from shorthand notes of Martin, Meredith, Henderson, and White, pp. 97-100.

He then refers to what is said in the judgment in the *Fisheries* case on that point,[12] and to the evidence adduced before Mr. Justice Duff in the case before the Board, and continues: "So apparently the evidence which his lordship was seeking was any place used for boat landing. . . . That is the sort of evidence which his lordship regards as being particularly material to the issue to be tried, and, I submit, that his lordship was entirely misdirecting himself on the question of what it was which was necessary in order to constitute a particular portion of the foreshore a part of a public harbour in such a sense that the property in that portion of the foreshore would have, by virtue of section 108 of the British North America Act, passed to the Dominion. You might with regard to almost any place upon the coast of any country where there are inhabitants at all, get evidence of equal strength of that kind, because, except where you have high cliffs, and so on, which make landing of any kind impossible, people living near the shore of the sea will of course, land wherever they can run a boat in at a spot at all near to their habitation." Their lordships, however, did not find it necessary to decide the question thus raised.

Public harbours (continued).—There remain certain other cases to be noticed in connection with the Dominion ownership of public harbours. In *Fader* v. *Smith*,[13] it was held on the authority of *Holman* v. *Green*,[14] that the provincial Government could confer no title to the cove or creek there in question, which was only one of a number of small inlets abounding on the shores of St. Margaret's Bay in the County of Halifax, Nova Scotia, not having the name or character of a public harbour, but which had been used on several occasions by small vessels for the purpose of loading timber. Weatherbe. J., however, dissented. Smith, J., says (at p. 438): "It occurs to me that the mere fact of vessels of a certain size, or rather beyond a certain size, not being in the habit of navigating the water creek, or inlet in question, although they might have been so navigated, cannot affect or limit the principle upon which *Holman* v. *Green* was defended."[15]

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[12] See *infra*, pp. 691-3.

[13] (1885) 18 N. S. 433.

In *Nash* v. *Newton*,[16] it appeared that public money of the province of New Brunswick was between 1846 and 1851 expended in opening and improving a channel through a sea wall which separated a small body of water known as Dark Harbour in the Island of Grand Manan from the Bay of Fundy, and the question was whether it thereupon became a public harbour, and it was held that it did. As Allen, C.J., says,

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[14] (1881) 6 S. C. R. 707. *Holman* v. *Green* was also followed in *Kennelly* v. *Dominion Coal Co.* (1904), 36 S. C. R. 495.

[15] By his report of January 20th, 1889, the Minister of Justice recommended the disallowance (unless sooner repealed) of a New Brunswick Act to incorporate a company to construct a subway beneath the harbour of St. John, as interfering with the public property of Canada, citing *Holman* v. *Green* (1881), 6 S. C. R. 707; Hodgins' Provl. Legisl., 1867-1895, at p. 748. But see *The Queen* v. *St. John Gas Light Co.* (1895), 4 Ex. C. R. 326, at p. 338.

[16] (1891) 30 N. B. 610.

(p. 618): "It became then a harbour in fact whether it had ever been so before or not."[16a]

In *McDonald* v. *Lake Simcoe Ice and Cold Storage Co.,*[17] the Court of Appeal held that a small bay in Lake Simcoe, at which there was a wharf where, with the permission of the owners, vessels used to call, but no mooring ground, and little shelter except from wind off the land, was not a harbour within the meaning of the British North America Act. Maclennan, J.A., says, (p. 422): " I think this bay does not answer the description " (*sc.* of a public harbour). " It is merely a small bay, roughly semi-circular or semi-elliptical in form, about 308 yards wide at the mouth and 132 yards across at the centre. . . I cannot think Parliament meant to include in this expression every little bay like the present when the owner of the adjacent shore had erected a wharf as a place of call for passing vessels."

Lastly, in *Perry* v. *Clergue,*[18] the question arose whether St. Mary's River between the town of Sault Ste. Marie in the province of Ontario and the town of Sault Ste. Marie in the State of Michigan is a public harbour, and Street, J., held that it was not, and says, (p. 364): " It is difficult to say what it is that constitutes a harbour, but, in my opinion something more is necessary to convert an open river front into a public harbour within the meaning of the British North America Act than the erec-

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[16a] See *supra*, p. 694, n.

[17] (1899) 26 O. A. R. 411. Reported below 29 O. R. 247; and in app., 31 S. C. R. 130, where the question of whether the *locus in quo* was a public harbour, or not, is not discussed.

[18] (1903) 5 O. L. R. 357.

tion along it of four or five wharves projecting beyond the shallows of the shore for the convenience of vessels receiving and discharging passengers and goods.'' He, also, says (pp. 363-4) :—
"Even if it be a public harbour, and, therefore, the property of the Dominion, I see no reason for thinking that the Dominion Government have, therefore, the right to grant any exclusive right over it" (*i.e.*, an exclusive ferry right) "such as is here claimed."[19]

Public harbours (continued). Fisheries.—In *Young* v. *Harnish*,[20] the Court held that the Dominion parliament could not authorize the grant to the plaintiff of an exclusive right to fish in the waters of St. Margaret's Bay, in Nova Scotia, even though it might be a public harbour. Graham, E.J., with whom the rest of the Court concurs, says (pp. 220-221) : "It was contended that public harbours belong to the Dominion, and that the place in which the traps were set formed part of a public harbour. Very likely this is so, but, if I understand the case just cited," (*sc.* the *Fisheries* case),[21] "I think these fisheries do not necessarily constitute a part of the harbour. The harbours may afford a protection to the nets, traps, and boats of the fishermen. When the nets or traps constitute an obstruction to the navigation, the Dominion authorities may, no doubt, by regulations interfere. But if the foreshore on the margin of a harbour according to that case, may or may not, according to circumstances, form part of a harbour, I think, the fishing is not necessarily part of the harbour. . . . For some purposes, as for the necessities of navigation, or for preserving or making more productive the fisheries, the Dominion authorities may apparently by regulation exclude the fishermen from setting traps, nets, etc., in some places altogether, or permit them to be set at long intervals apart, and at some seasons, but apparently they cannot by the effect of any such legislation give any fisherman an exclusive right to fish in any particular place.[22] It is not necessary in this view to deal with the question of the right of the Crown, either for the Dominion or the province, to give any one an exclusive right of fishing in a navigable arm of the sea.'"[23]

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[19] See as to this *supra*, pp. 224-9. It is no objection to a local option by-law that it includes a public harbour, for although "the harbour may be, as a harbour, within the jurisdiction of the parliament of Canada, it is none the less for purposes within the ambit of provincial legislation, within the jurisdiction of the province and its legislatures, provincial and municipal:" *Re Sturmer and Town of Beaverton* (1911), 24 O. L. R. 65, 72.

[20] (1904) 37 N. S. 213.

[21] [1898] A. C. 701.

'Rivers and lake improvements.'—The Dominion Government prior to the decision of the Privy Council in the *Fisheries* case,[24] had from time to time advanced the peculiar contention,[25] that these words mean not 'river improvements' and 'lake improvements' but 'rivers, and lake improvements' thus making all rivers not granted before Confederation the property of the Dominion.[26] But in the *Fisheries* case the Privy Council affirmed the Supreme Court in rejecting this contention. They say, (at pp. 710-711): "Upon the whole, their lordships, after careful consideration, have arrived at the conclusion that the Court below was right, and that the improvements only were transferred to the Dominion. There can be no doubt that the subjects comprised in the schedule are for the most part works or constructions which have resulted from the expenditure of public money, though there are exceptions. It is to be observed that rivers and lake improvements are coupled together as one item. If the intention had been to transfer the entire bed of the rivers and only artificial works on lakes, one would not have expected to find them thus coupled together. Lake improvements might in that case more naturally have been found as a separate item or been coupled with canals. Moreover it is impossible not to be impressed by the inconvenience which would arise if the entire rivers were transferred, and only the improvements of lakes. How would it be possible in that case to define the limits of the Dominion and provincial rights respectively? Rivers flow into and out of lakes; it would often be difficult to determine where the river ended and the lake began. Reasons were adduced why the rivers should have been vested in the Dominion; but every one of these reasons seems equally applicable to lakes. The construction of the words as applicable to the improvements of rivers only is not an impossible one. It does no violence to the language employed. Their lordships feel justified, therefore, in putting upon the language used the construction which seems to them to be more probably in accordance with the intention of the legislature."

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[22] See, however, per Girouard, J., in *In re Provincial Fisheries* (1896), 26 S. C. R. at p. 564, who says: "I am of the opinion that 'public harbours' . . . being the property of the provinces at the time of Confederation, became the property of the Dominion; and that as such proprietor, the Dominion became the owner of the soil and of the fisheries therein."

[23] On the general subject of jurisdiction over fisheries see, further, pp. 247-263 *supra*.

[24] *Attorney-General for the Dominion* v. *Attorneys-General for the Provinces*, [1898] A. C. 700.

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[25] See *e.g.* the reports of Ministers of Justice, in Hodgins' Prov. Legisl. 1867-1895, at pp. 764, 1122, 1147.

[26] Girouard, J., says in *In re Provincial Fisheries* (1896), 26 S. C. R. at pp. 542-4: "The text has no punctuation; the 's' thrown in at the end of the word 'river' is to my mind a clerical error or misprint. It is not to be found in the Quebec Conference resolutions, nor in the address of the provinces to the Queen praying for the Confederation Act, which read 'river and lake improvements.' When the Act was first published in the two official languages in Canada, the Dominion authorities adopted as correct the following translation '*ameliorations sur les lacs et rivieres*,' which is also to be found in the address of the provinces to the Imperial parliament." It appears from Pope's Confederation Documents, at p. 108, that the word 'rivers' first appeared in the London Resolutions of December 4th, 1866.

In the same case, (at pp. 709-711), their lordships say: "It is unnecessary to determine to what extent the rivers and lakes of Canada are vested in the Crown, or what public rights exist in respect to them. Whether a lake or river be vested in the Crown as represented by the Dominion, or as represented by the province in which it is situate, it is equally Crown property, and the rights of the public in respect to it except in so far as they may be modified by legislation are precisely the same. The answer, therefore, to such questions as those adverted to,[27] would not assist in determining whether in any particular case the property is vested in the Dominion, or in the province."

In *Perry* v. *Clergue,*[28] Street, J., held that the ownership of river improvements does not give the Dominion Government any right to grant a ferry across the river which did not exist apart from them. So far, however, as respects such a river as that there in question, *i.e.* one flowing between a province of Canada and the United States, as, also, in the case of any inter-provincial river, the point is unimportant so long as the Supreme Court decision in *In re International and Interprovincial Ferries,*[29] stands, for it was there held, contrary to the view of Street, J., in *Perry* v. *Clergue,* that the parliament of Canada has exclusive authority to, and to authorise the Governor-General in Council to, establish or create ferries between a province and any British or foreign country, or between two provinces.[30]

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[27] Their lordships seem to mean questions as to public rights as contrasted with rights of the Crown in respect to rivers and lakes.

[28] (1903) 5 O. L. R. 357, 364-5.

[29] (1905) 36 S. C. R. 206.

[30] However a memorandum of the Attorney-General of Ontario which was read in the House of Commons at Ottawa on May 7th, 1909, in the course of the debate on the bill to incorporate the Ontario and Michigan River Company, generally known as the Conmee Bill, had the following passage: 'The circumstance that a stream is an international stream, it is submitted, gives to the parliament of Canada no jurisdiction over the stream, nor does it deprive the province of its jurisdiction; neither the Dominion nor the provinces has complete jurisdiction for all purposes over such a stream, and that of the Dominion is no greater than that of the province, except, possibly, with reference to making some treaty or international

Lastly, in *Macdonald* v. *The King*,[31] Burbidge, J., held that the first clause of the 3rd Schedule of the British North America Act, 1867, which enumerated ' canals with land and water power connected therewith ' (of which the Cornwall Canal is one) as part of the ' provincial public works and property ' that by virtue of section 108 of the Act became ' the property of Canada,' does not give the Dominion any proprietary rights in the River St. Lawrence from which the water is taken for the Cornwall Canal, beyond the right to take the water, nor make the river itself a public work of Canada.[31a]

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arrangement with reference to it. Although a river may be international, it still remains, so far as it is Canadian, a part of the province through which it flows: '—Reported in the Toronto *Globe* for May 8th, 1909.

[31] (1906) 10 Ex. C. R. 394. In *Dixson* v. *Snetsinger* (1873), 23 C. P. 235, it was decided that the St. Lawrence river, where it flowed through the township of Cornwall, in the province of Ontario, being a navigable river, its bed, even above tide-water, was vested in the Crown, and not in the riparian proprietors, the rule of the civil law being still held to apply to it under the Quebec Act, Imp. 14 Geo. III. c. 83, and not to have been affected by the Constitutional Act, Imp. 31 Geo. III. c. 31, nor by the statute of Upper Canada, 32 Geo. III. c. 1. But no question was raised in that case as to whether the river bed was vested in the Crown as represented by the Dominion Government, or as represented by the provincial Government. *Aliter* as to the Winnipeg River in Manitoba: *Keewatin Power Co.* v. *Town of Kenora* (1908), 16 O. L. R. 184, where *Dixson* v. *Snetsinger* does not appear to have been referred to. But see *Bartlett* v. *Scotten* (1895), 24 S. C. R. 367. As to the ownership of beds of rivers in Ontario, see now 1 Geo. V., c. 6, O.

[31a] As to the provincial Attorney-General being competent to take proceedings to restrain pollution of navigable waters, as well as the Attorney-General of Canada, see *Attorney-General of Canada* v. *Ewen* (1895) 2 B. C. 468. As to provincial legislatures having the right to make a municipality extend to the middle of a navigable river, see *Central Vermont R. W. Co.* v. *Town of St. Johns* (1886) 14 S. C. R. 288.

Right to cut ice in rivers.—We may here incidentally mention the recent case of *Dupuis* v. *Saint Jean*,[32] where Campagne, J., has held that the waters of navigable and floatable rivers, whether in a solid condition when frozen in winter, or in their natural state, are part of the public domain for the use of all, and are not the subject of private property (*hors du commerce*); and that, therefore, a concession by the Government of a province of the right to ' cut, take, and sell ' the ice, over a determinate area of a navigable river is null and void for want of a subject-matter. Presumably this correctly states the law of Quebec, and it is in accordance with the civil law rule that such rivers are *publici juris* for the use of all, and that what is *publici juris* is *extra commercium. Sed quære* as to the other provinces where the common law prevails.[33]

' Railways.'—A curious question under section 108 arose in the *Windsor and Annapolis R. W. Co.* v. *Western Counties R. W. Co.*[34] The Government and legislature of Nova Scotia prior to Confederation granted or leased certain running powers and other rights to the Windsor and Annapolis Railway Company, a private corporation, over a provincial railway known as the Windsor branch railway; and all the judges in the provincial Supreme Court, with the exception of one, agreed that, though this provincial railway became vested in Canada under section 108 of the British North America Act, it did so, subject to the rights of the Windsor and Annapolis Railway Company; and on the case ultimately reaching the Privy Council, this point was finally set at rest, for their lordships say that in their opinion section 108 " had not the effect of vesting in Canada any other or larger interest in these railways " (*sc.* railways which were at Confederation the property of Nova Scotia) " than that which belonged to the province at the time of the statutory transfer."[35] But the question then arose whether the Dominion parliament after Confederation could legislate in respect to the Windsor branch railway in such a way as to override and defeat the rights of the Windsor and Annapolis Railway Company above referred to. The Privy Council, when the case came before them, held that the Dominion Act in question did not do this, and, therefore, they express no opinion whatever on the point, which they called, however, " a question of difficulty and importance." But the judge of first instance, (Ritchie, E.J.), though he took a similar view as to the proper import of the Dominion Act in question says, also,[36] that the Dominion parliament has power to dispose only of the interest it may have in Dominion property, upon the ground that "while property of the Dominion is one of the subjects over which the parliament of Canada has power of legislating, private property and civil rights were placed within the powers of the local legislature, and private property and civil rights are both invaded by this Act.'"[37]

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[32] (1910) R. J. Q. 38 S. C. 204.

[33] As to the Common law in respect to ownership of rivers, see Encyc. of English law, 2nd ed., *sub voc.* ' Waterways.'

[34] (1882) Russ. Eq. 287, 383, 3 R. & C. 377, 2 R. & G. 280, 7 App. Cas. 178.

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[35] *Cf.* per Sedgwick, J., in the *Indian Claims* case, *Province of Ontario* v. *Dominion of Canada and Province of Quebec* (1895), 25 S. C. R. at p. 532. There would seem to be a certain analogy in the holding of the Supreme Court in *The Queen* v. *Moss* (1896), 26 S. C. R. 322, that if a province before Confederation had so dedicated the bed of a navigable river for the purposes of a bridge, that it could not have objected to it as an obstruction to navigation, the Crown, as representing the Dominion, on assuming control of the navigation, was bound to permit the maintenance of the bridge.

'Custom houses, post offices, and all other public buildings, except such as the Government of Canada appropriates for the use of the provincial legislatures and Governments.'—A question arose in 1893 as to the effect of this in connection with a New Brunswick Act, which assumed to declare the rights of the Crown in respect to what was therein described as 'Government House property,' the Act being reserved for the signification of the Governor-General's pleasure. By Order in Council of February 11th, 1870, the property had been appropriated by the Dominion Government to the use of the Government and legislature of the province of New Brunswick, and in a report, as Minister of Justice, on the Act, dated January 26th, 1893, Sir John Thompson expresses the view that: "That Order in Council constituted an appropriation of the property in question within the meaning of the statute, changing its character and converting it *sub modo* into public property of the province. It did not, as the Minister thinks, vest an absolute title in the Crown in right of the province, but gave the use thereof to the provincial authorities for the purpose specified in the Order in Council. He admits that he cannot assert that the matter is free from doubt, but submits any such doubt should not be set at rest by a provincial statute asserting the provincial view, and recommended that no action should be taken on the Bill.[38]

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[36] Russ. Eq. at p. 307.

[37] See, however, *supra*, pp. 166-9.

Section 109 of the British North America Act.—We can now proceed to consider section 109 which is as follows:—

109. All lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.[39]

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[38] Hodgins' Prov. Legisl. 1865-1895, at pp. 757-8.

[39] This section of course applies *mut. mut.* to the other provinces admitted into the Union since Confederation, other than Manitoba, Alberta, and Satkatchewan, where the public lands are still retained by the Dominion, except that by 48-49 Vict. c. 53, s. 1, (now R. S. C. 1906, c. 99, s. 3; see also as to Manitoba R. S. C. 1906, c. 55, s. 5) it was provided that all Crown lands which may be shown to the satisfaction of the Dominion government to be swamp lands shall be transferred to the province of Manitoba, and enure wholly to its benefits and uses. See *Attorney-General for Manitoba* v. *Attorney-General for Canada*, [1904] A. C. 799, 34 S. C. R. 287, and *infra*, p. 710, n.

Nature of ownership by the Crown in Canada.—It is well to recall, in the first place, the words of the Privy Council in *St. Catharines Milling and Lumber Co.* v. *The Queen,*[40] that: " In construing these enactments " (*sc.* of the British North America Act) " it must always be kept in view that where public lands, with its incidents, is described as the ' property of ' or as ' belonging to ' the Dominion or a province, these expressions merely import that the right to its beneficial user, or to its proceeds, has been appropriated to the Dominion, or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown." And so, again, in the *Fisheries* case,[41] their lordships held it to be " unnecessary to determine to what extent the rivers and lakes of Canada are vested in the Crown, or what public rights exist in respect of them; " adding: " whether a lake or river be vested in the Crown as represented by the Dominion, or as represented by the province, in which it is situate, it is equally Crown property, and the rights of the public in respect of it, except in so far as they may be modified by legislation are precisely the same.[42]

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[40] (1888) 14 App. Cas. at p. 56.

[41] *Attorney-General for the Dominion of Canada* v. *Attorneys-Generals for the Provinces*, [1898] A. C. 700, at pp. 709-711.

[42] **Grants to and by the Crown in Canada.**—A grant or conveyance of land 'to the Dominion Government' should be interpreted as though expressed to be 'to Her Majesty, her heirs and successors, in right of and for the use of her Dominion of Canada:' *The Queen* v. *Farwell* (1887), 14 S. C. R. 392, (see especially per Strong, C.J., at p. 425, reversing the decision of Henry, J., *ibid.* at p. 404.) And in *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1889), 14 App. Cas.

'All lands, mines, minerals, and royalties.' Indian lands.—The matter of legislative power over Indian lands has been discussed in connection

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295, where the same grant or conveyance was in question as that in *The Queen* v. *Farwell*, namely, that by the province of British Columbia to the Dominion government of public lands along the line of the Canadian Pacific railway in furtherance of its construction, and in pursuance of the Articles of Union under which that province entered Confederation, the Privy Council say (14 App. Cas. at pp. 301-2): "The title to the public lands of British Columbia has all along been and still is vested in the Crown. It seems clear that the only 'conveyance' contemplated was a transfer to the Dominion of the provincial right to manage and settle the lands and to appropriate their revenues. It was neither intended that the lands should be taken out of the province nor that the Dominion Government should occupy the position of a freeholder within the province. In the same case, in the Court below, Gwynne, J., observes:—"The Government from the nature of the Constitution of the Dominion, could not take lands by grant or otherwise, nor could it have the power of appropriation of the tract in question, otherwise than under the direction and control of the parliament of Canada: " 14 S. C. R. at p. 375. Two other recent Privy Council decisions relating to Crown ownership of land as between the Dominion and the provinces may here be mentioned. In *Attorney-General for Manitoba* v. *Attorney-General for Canada*, [1904] A. C. 799, 34 S. C. R. 287, 8 Ex. C. R. 337, it was held that where a Dominion Act provided—'All Crown lands in Manitoba which are shewn to the satisfaction of the Dominion Government to be swamp lands, shall be transferred to the province and enure wholly to its benefit and uses,' this did not operate as an immediate transfer to the province of any swamp lands, or of the profits arising therefrom, but only from the date of the Order in Council made after survey and selection as prescribed by the Act; and that down to that date the profits resulting from the lands belonged to the Dominion. At 8 Ex. C. R. 341, Burbidge, J., observes: "When the statute mentions a transfer of Crown lands from the Dominion to the province, the meaning is not that there is any transfer of title of these lands. That remains all the time in the Crown. What is transferred is the right to administer such lands, and the right to appropriate the revenues therefrom: and the latter right will in general follow and coexist with the former. In *Attorney-General of British Columbia* v. *Attorney-General of Canada*, [1906] A. C. 552, the Privy Council held that Deadman's Island lying near the entrance to Burrard's Inlet in the harbour of Vancouver is Dominion with No. 24 of section 91;[43] and the decisions in *St. Catharines Milling and Lumber Co.* v. *The Queen,*[44] and *Ontario Mining Co.* v. *Seybold,*[45] in which the Privy Council held that lands in Ontario surrendered by the Indians by treaty belong in full beneficial interest to the Crown as representing the province, subject only to any privileges of the Indians reserved by the treaty; and that the Crown can only dispose thereof on the advice of the Ministers of the province, and under the seal of the province,—were there referred to, as well as several other decisions bearing upon the title to Indian lands which it is, therefore, unnecessary to again notice here.

Indian Title in British Columbia.—Special mention, however, must be made here of the peculiar position of matters at the present time in respect of Indian title in British Columbia. The Government of British Columbia has, since that province entered Confederation in 1871, taken up the position that the Indians in that province have no such right or title as has been affirmed by the Privy Council in the *St. Catharines Milling and Lumber Co.* case, and recognized in Ontario and the other provinces of the Dominion. Apparently they refuse to recognize that case as establishing the Indian title, and contend that British Columbia was not, in the

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property, having been transferred to the Dominion by special grant of the Imperial Government in 1884, it having been Imperial property as a military reserve at the time of Confederation. This case is reported below at 8 B. C. 242, 11 B. C. 258.

[43] *Supra*, pp. 296-303.

[44] (1888) 14 App. Cas. 46, at p. 59.

[45] [1903] A. C. 73.

full sense of international law, British territory until after the date of the Royal Proclamation of October 7th, 1763,[illegible] referred to by the Privy Council in the *St. Catharines Milling and Lumber Co.* case, and by which the Imperial Government guaranteed the title of the Indians in 'such parts of our Dominions and territories as not having been ceded to, or purchased by us, are reserved to them, or any of them, as their hunting grounds,' although the British flag was hoisted on the Pacific coast by Sir Francis Drake 300 years ago after negotiation with the natives. In 1874-5 the Dominion Department of Justice investigated the whole matter, and reported in favour of the Indian title.[45b] On September 20th, 1876, Lord Dufferin, as Governor-General of Canada, in an address at Government House, Victoria, said[45c]: "From my first arrival in Canada I have been very much pre-occupied with the condition of the Indian population in this province. You must remember that the Indian population are not represented in parliament,

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[45a] This Proclamation is printed at length in Houston's Constitutional Documents of Canada, p. 67. It was declared by Lord Mansfield in *Campbell* v. *Hall* (1774) 1 Cowp. 204, to have the effect and operation of a statute of the Imperial parliament. This judgment is printed by Mr. Houston, *op. cit.* 79. It appears from the words of Allen, C.J., in *Doe d. Burk* v. *Cornier* (1890), 30 N. B. at pp. 147-50, that there has never been any doubt in New Brunswick that the title to land in the province reserved for the use of Indians remained, like all the other ungranted lands, in the Crown, the Indians having at most a right of occupancy; and that Indian Reserve lands in New Brunswick were not affected by the Royal Proclamation of 1763, nor subject to the treaty of 1873, as to which see *infra*, p. 715.

[45b] See Hodgins' Prov. Legisl. 1867-1895, pp. 1025-8.

[45c] Speeches and Addresses of Lord Dufferin, edited by Henry Walton (John Murray, 1882), p. 209.

and consequently that the Governor-General is bound to watch over their welfare with especial solicitude. Now we must all admit that the condition of the Indian question in British Columbia is not satisfactory. Most unfortunately, as I think, there has been an initial error ever since Sir James Douglas quitted office, in the Government of British Columbia neglecting to recognize what is known as the Indian title. In Canada this has always been done; no Government, whether provincial or central, has failed to acknowledge that the original title to the land existed in the Indian tribes and communities that hunted or wandered over them.'' Nothing, however, was done until in 1909 a petition was presented on behalf of the Cowichan Tribe of Indians in British Columbia direct to His Majesty (a very interesting proceeding as coming from British subjects in the Dominions across the sea in this 20th century); a similar petition being at the same time presented to the Secretary of State for the Colonies, by Mr. J. M. Clark, K.C., of Toronto, who crossed to England with these petitions as counsel for the Indians. These petitions asked for a reference to the Judicial Committee, under Lord Brougham's Act (so much referred to by the Privy Council in their recent judgment concerning references by the Governor-General in Council,[45d]) of the whole question of the rights of the said tribe. The result was that in accordance with the requirements of the Secretary of State for the Colonies,

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[45d] *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1912] A. C. 571.

Mr. Lewis Harcourt, as expressed in a despatch to Lord Grey of July 6th, 1911,[45e] the petition was referred to the Dominion Government for consideration. Mr. Harcourt in this despatch expressed his ‘ earnest hope that the provincial Government or the Dominion Government, or both, will find it possible to take early steps to arrive at an equitable solution of this troublesome case.’ The Department of Justice subsequently took steps for a reference to the Supreme Court, and questions to be submitted were drawn up and agreed upon between the Department of Justice and the counsel for British Columbia, and for the Indians; but the province subsequently refused to proceed, and the Dominion Government held that its consent was necessary to the reference. The whole matter is, however, as the writer is informed, to be shortly submitted to the Judicial Committee under Lord Brougham's Act. In this way it may be hoped that what is now a dangerous situation may be put an end to.

Dominion Treaty Indemnity Case.—The recent decision of the Privy Council in *Dominion of Canada* v. *Province of Ontario,*[46] establishes the proposition that when the Dominion Government obtains by treaty from Indians the surrender of their interest over a tract of land, acting not as agent or trustee for the province in which the land in question is situate, or for the benefit of the province, but with a view to great national interests, that is, for distinct and important interests of their own, and in pursuance of powers derived from the British North America Act, 1867, it has no legal claim against the province to whose benefit the surrender enures, for annuities, or other money, paid or payable under the treaty in respect to such surrender. The question arose in the following way. In 1873 a treaty was made between the Queen, acting on the advice of the Dominion Government, and the Salteaux tribe of Ojibeway Indians, the effect of which was to extinguish by consent the Indian interest over a large tract of land about 50,000 square miles in extent, and in return to secure to the Indians certain payments and other rights agreed to and promised by Her Majesty. At the time it had not been ascertained whether any part of this land was included within the province of Ontario, or not, but it was afterwards, and before this case arose, ascertained that the greater part of it was so. In making the treaty the Dominion Government acted upon the right conferred upon it by the British North America Act. They were not acting in concert with the Ontario Government, but on their own responsibility, and, it was conceded, that the motive was not any special benefit to Ontario, but a motive of policy in the interests of the Dominion as a whole. When, however, by subsequent decisions it was established that, under the British North America Act, lands which are released from the overlying Indian interest enure to the benefit, not of the Dominion, but of the province within which they are situated, it became apparent that Ontario had derived an advantage under the treaty. The Dominion Government then initiated these proceedings claiming that Ontario should recoup the Dominion for so much of the burden undertaken by the Dominion towards the Salteaux tribe as might properly be attributed to the lands within Ontario which had been disencumbered of the Indian interest by virtue of the treaty. The Exchequer Court having decided in favour of this contention, the provincial Government appealed to the Supreme Court which allowed the appeal, (Girouard and Davies, JJ., dissenting); and the Dominion Government appealed to the Privy Council. Their lordships, in the first place, affirmed the view of the Supreme Court that the appellants must bring their claim within some recognised legal principle:[47] and then dealing with the legal principles governing the case before them they say, (pp. 645-646): "To begin with, this case ought to be regarded as if what was done by the Crown in 1873 had been done by the Dominion Government, as in substance it was in fact done. The Crown acts on the advice of Ministers in making treaties, and in owning public lands holds them for the good of the community. When differences arise between two Governments in regard to what is due to the Crown as maker of treaties from the Crown as owner of public lands they must be adjusted as though the two Governments were separately invested by the Crown with its rights and responsibilities as treaty maker and as owner respectively. So regarding it, there does not appear sufficient ground for saying that the Dominion Government in advising the treaty did so as agent for the province. . . . Again it seems to their lordships that the relation of trustee and *cestui que trust,* from which a right to indemnity might be derived, cannot, even in its widest sense, be here established. . . . The only thing in which the Dominion could conceivably be thought trustees for the province, namely, the dealing with an Indian interest, was a thing concerning the whole Canadian nation. In truth, the duty of the Dominion Government was not that of trustees, but that of Ministers exercising their powers and their discretion for the public welfare. Another contention was advanced on behalf of the appellants,—that this is analogous to the case of a *bona fide* possessor, or purchaser, of real estate who pays money to discharge an existing encumbrance upon it without notice of an infirmity of his title. It is enough to say that the Dominion Government were never in possession, or purchasers, of these lands, that they had, in fact, notice of the claim thereto of the true owner, though they did not credit it, and that they did not pay off the Indian encumbrance for the benefit of these lands, but for distinct and important interests of their own. This really is a case in which expenditure independently incurred by one party for good and sufficient reasons of his own, has resulted in a direct advantage to another. It may be that, as a matter of fair play between the two Governments, as to which their lordships are not called upon to express, and do not express, any opinion, the provinces ought to be liable for some part of this outlay. But in point of law, which alone is here in question, the judgment of the Supreme Court appears unexceptionable."

[45e] Canada: No. 552.

[46] [1910] A. C. 637. Reported below 42 S. C. R. 1, 10 Ex. C. R. 445.

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[47] As to this see *infra*, pp. 738-9.

Burbidge, J., and the two dissenting judges in the Supreme Court had relied almost entirely upon a passage in the judgment delivered by Lord Watson in the case of *St. Catharines Milling and Lumber Co.* v. *The Queen*,[48] where, having decided that the lands in question there, being part of the lands in question here, became within the meaning of section 109 of the British North America Act, on the extinguishment of the Indian title the property of Ontario in terms of that clause, their lordships go on to state their opinion of the effect of the extinguishment of the Indian title so far as the liability of the province was concerned for the considerations which the Dominion Government had paid, or agreed to pay, for that extinguishment, and say: " Seeing that the benefit of the surrender now accrues to her, Ontario must, of course, relieve the Crown and Dominion of all obligations involving the payment of money which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government." But, as to this, their lordships say, in the case now under consideration: " The point here raised was not either raised, or argued, in that case, and it is quite possible that Lord Watson did not intend to pronounce upon a legal right. If he did so intend, the passage in question must be regarded as *obiter dictum.*"

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[48] (1888) 14 App. Cas. 46, at p. 60.

As to the argument raised on behalf of the Dominion, that in undertaking the obligations in question under the treaty with the Indians, the Dominion acted as agent of Ontario under a constitutional agency arising out of the powers and duties with which the Dominion is invested and burdened by the British North America Act, the Privy Council (p. 645) dispose of the point by saying that, as a matter of fact, the Dominion Government in advising the treaty did not do so as agents for the provinces: "they acted with a view to great national interests, in pursuance of powers derived from the Act of 1867, without the consent of the province, and in the belief that the lands were not within that province. They neither had, nor thought they required, nor purported to act upon, any authority from the provincial Government."[49]

Extinguishment of Indian title. — We have seen,[50] that in *St. Catharines Milling and Lumber Co.* v. *The Queen,*[51] Burton, J.A., expressed the opinion that the provincial authorities undoubtedly have the power to extinguish the Indian title; while Rose, J., in *Caldwell* v. *Fraser,*[52] had expressed the view that that right exists in the Dominion. We may add that in *Dominion of Canada* v. *Province of Ontario,*[53]

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[49] And see per Duff, J. (with whom Maclennan, J., concurred in the Court below: 42 S. C. R. at pp. 126-7); *aliter* per Davies, J. (with whom Girouard, J., concurred), S. C. at pp. 93-94.

[50] *Supra,* p. 300.

[51] 13 O. A. R. at p. 167.

[52] Unreported, but printed in McPherson and Clark's Law of Mines, pp. 15-24.

[53] 42 S. C. R. at p. 93.

Davies, J., says: "The Dominion parliament by its legislation of 1868, 31 Vict. c. 42, D., prescribed the manner in which the title and lands might be surrendered up, or ceded. I take it that after this exercise of legislative power, the Dominion, and the Dominion alone, could act so as to extinguish the Indian title to any lands within the Dominion. And a writer in the Canadian Law Times,[54] after observing that the case of *St. Catharines Milling and Lumber Co.* v. *the Queen* left undecided whether a province could of its own motion and power extinguish the Indian rights, adds: "Apparently it could not. To permit that would be to permit an interference with the direct powers of legislation granted to the Dominion parliament."

In connection with the Privy Council decision in *Ontario Mining Co.* v. *Seybold,*[55] Mr. Newcombe says in his useful Handbook on the British North America Act:[56] "This decision determines nothing with regard to the quality or extent of the interest acquired by the Indians in special reserves competently selected and appropriated for them under the provisions (of the North West Angle Treaty) of 1873. Moreover the case is not properly reported so far as the statement goes that counsel were heard on behalf of the Dominion, the fact being that during the argument the practical questions in difference between the Dominion and Ontario were arranged by agreement between counsel, as stated by Lord Davey at the conclusion of his judgment; and consequently counsel for the Dominion were not called upon, nor was any argument made on behalf of the Dominion in support of the contention put forward in the Case of the Dominion, that, assuming Reserve 38 B," (of which the lands in question were part) "to have been validly created according to the intention of the treaty of 1873, the Indians acquired therein an interest, which, upon surrender to the Dominion for sale, it became competent for the Dominion to convey. This point, therefore, remains open so far as the Judicial Committee is concerned."[57]

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[54] 12 C. L. T. p. 163.

[55] [1903] A. C. 73.

[56] Ottawa: 1908, p. 92.

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[57] But see per Rose, J., in *Caldwell* v. *Fraser*, *supra*, pp. 299-300. It is obvious that the enumeration in schedule 3 of provincial public works and property which are to be the property of Canada cannot be reasonably held to include Crown lands which are reserved for Indian use: *St. Catharines Milling & Lumber Co.* v. *The Queen* (1888), 14 App. Cas. at p. 56, see *supra*, p. 690, n. As to the Indian title in Canada being a mere burden on the proprietary estate of the Crown in the lands, and to be ascribed, except in special instances, to the general provisions of the royal proclamation of Oct. 7th, 1763, and as to such Indian lands being, before surrender, vested in the Crown subject to an interest, other than that of the province, in the same, within the meaning of section 109 of the British North America Act, the tenure of the Indians, however, being only a personal and usufructuary right, dependent upon the goodwill of the Sovereign, see S. C. The fact that under the treaty of surrender, it may still possess exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits or otherwise, of the beneficial interest in the timber, which passes to the province: S. C. at p. 60. In New Zealand, also, the Crown is bound to recognise native proprietary right: *In re London and Whitaker Claims Act* (1872), 2 C. A. 41, at pp. 49-50. It has been there held that the right of conclusively determining when the native title has been duly extinguished is a prerogative right; that transactions with the natives for the cession of their title to the Crown are acts

'All lands, mines, minerals, and royalties.' ' Lakes, rivers and other waters and fisheries.'—In the last mentioned case, the Supreme Court decided,[58] that under ' lands ' in section 109 of the British North America Act are comprised the beds of all lakes, rivers, and other waters (except public harbours)[59] within the territorial limits of the several provinces which had not been granted by the Crown before Confederation of every description; and that there is no distinction, as suggested in that case, in this respect, between salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes and other lakes, or the so-called great rivers, such as the St. Lawrence river, Richelieu, Ottawa, and other rivers, or between waters directly and immediately connected with the sea-coast, and waters not so connected, or between other waters and waters separating (or so far as they do separate) two or more provinces of the Dominion from one another, or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a foreign nation.[60]

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of State, and cannot be examined in any Court, and that the issue of a Crown Grant implies a declaration by the Crown that the native title to the land has been extinguished, and is conclusive in all Courts against any person asserting that the land therein comprised was never duly ceded: *Wi Parata* v. *Bishop of Wellington*, 3 J. R. N. S. S. C. 72.

[58] *In re Provincial Fisheries* (1896), 26 S. C. R. 444. And see *Queen* v. *Moss* (1896), 26 S. C. R. 322.

[59] As to public harbours, see *supra*, pp. 691-700.

[60] The Privy Council on appeal, [1898] A. C. 700, did not deem it necessary to deal with this question further than to say, (p. 709): "Whatever proprietary rights were at the time of the British North America Act possessed by the province remain vested in them except such as are by any of its express

Gwynne, J., however, speaks somewhat ambiguously, saying,[61] simply, that the beds of all such waters not granted before Confederation are vested in Her Majesty subject to the jurisdiction and control of the Dominion parliament, in so far as may be deemed necessary by that parliament, or required for creating future harbours, or for the erection of beacons, piers, or lighthouses, or other public works hereafter to be constituted for the benefit of the Dominion and within the jurisdiction of the Dominion parliament, as, *e.g.*, bridges over navigable waters,[62]

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enactments transferred to the Dominion of Canada," and to deal specifically with the ownership of 'public harbours,' 'rivers,' and 'fisheries.' The Supreme Court, also, in this case, affirm the view, in accordance with several prior provincial decisions, that the rule applicable to non-navigable water, that the riparian proprietors whose grants are bounded by the stream are entitled to property in the bed *ad medium filum* does not apply to the great lakes of Canada, or to rivers *de facto* navigable: see per Strong, C.J., 26 S. C. R. at p. 530, *et seq.*, with whom, King, J., concurs: per Girouard, J., at p. 548, *et seq.* Girouard, J., says that in most, if not all the provinces, the distinctions of the English common law had been removed by local legislation before Confederation. See, now, as to Ontario, 1 Geo. V. c. 6, O. Girouard, J., also, observes in this case, that it had been suggested that "the ownership of the lands covered by sea within the three mile limit, and of all lands covered by tidal water, is subject, under section 109 of the British North America Act, to a 'trust' or 'interest' created by Magna Charta in favour of the public, which, since Confederation, is held and represented by the Dominion for the benefit of the people of the Dominion at large, and is under the control of the Dominion parliament." But he says that the contention is not maintainable, and points out that even if the provisions of Magna Charta could be held to constitute any such 'trust' or 'interest' the public interested in the foreshore fisheries before Confederation was the public of the province which held the same for its benefit only, and not the public of the Dominion, which had no existence: 26 S. C. R. at p. 569.

[61] 26 S. C. R. at p. 541. See, however, his words at pp. 544-5.

[62] See *supra*, pp. 241-5.

railways, or the terminal of railways and the like, and, in short, all other works placed under the jurisdiction of the Dominion parliament by virtue of the exception to item 10 of section 92, or otherwise,[63] and, also, specially as regards the administration of the fisheries."[64]

Fisheries.—The subject of proprietary right in fisheries as between the provinces and the Dominion has been dealt with in connection with the Dominion power over 'Sea Coast and Inland Fisheries' under No. 12 of section 91.[65]

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[63] In *Montreal Light, Heat and Power Co.* v. *Archambault* (1907-8), R. J. Q. 16 K. B. 410, aff. 41 S. C. R. 116, it was decided that a bridge constructed by an individual in the province of Quebec before Confederation over the Richelieu River at Chambly, Quebec, near where it flows into the St. Lawrence, by virtue of an Act of the province of Canada, under the condition that on the expiration of fifty years, it should belong to the Crown, became, at the falling in of the term in 1895, the property of the province of Quebec, by virtue of s. 109 of the British North America Act. See, also, *Queen* v. *Yule* (1899), 6 Ex. C. R. 103, 30 S. C. R. 24. In *Queen* v. *Moss* (1896), 26 S. C. R. 322, the Supreme Court held that if a province before Confederation had so dedicated the bed of a navigable river for the purpose of a bridge that it could not have objected to it as an obstruction to navigation, the Crown as representing the Dominion, on assuming control of the navigation, was bound to permit the maintenance of the bridge.

[64] Girouard, J., states in this case, (at p. 555): "In the United States it is well settled law that the title to all tidal waters and their beds and the fisheries therein is vested, not in the United States, but in the several States of the Union, subject to the regulations of Congress wherever connected with inter-State or foreign commerce. Likewise in many of the States, inland rivers and lakes navigable are, like tide waters, State public property." As to a Crown grant derogating from a public right of navigation, see *Queen* v. *Fisher* (1891), 2 Ex. C. R. 365; *Queen* v. *St. Johns Gas Light Co.* (1895), 4 Ex. C. R. 326, at p. 346; and *In re Provincial Fisheries*, 26 S. C. R. at p. 575. But see *Normand* v. *St. Lawrence Navigation Co.* (1879), 5 Q. L. R. 215. See also *supra*, p. 709, n.

[65] *Supra*, pp. 247-263.

'All lands, mines, minerals, and royalties' (continued). Escheats. — In *Attorney-General of Ontario* v. *Mercer,*[66] the Privy Council decided that whether the word 'royalties,' extended to royal rights besides those connected with lands, mines, and minerals, or not, a point which they were not called upon to decide, it certainly included royalties in respect to lands, such as escheats, and ought not to be restrained to rights connected with mines and minerals only; and so they held that lands in the province of Ontario escheated to the Crown for defect of heirs belonged, "in the sense in which the verb is used in the British North America Act," to the province and not to the Dominion; and that this was one of the exceptions referred to in section 102 of the Act,[67] whereby, subject to such exceptions, the general public revenues of the province were vested in the Dominion; for the profits and proceeds of sales of land escheated to the Crown are part of the casual territorial revenues of the Crown.[68]

In his report of August 25th, 1885, upon the Manitoba Act, 47 Vict. c. 26, respecting escheats and forfeitures of estates of insolvents, Sir Alexander Campbell, as Minister of Justice, points out that in *Attorney-General of Ontario* v. *Mercer,* the Privy Council do not decide anything in respect of personal estate which escheats for want of next of kin; and (2) that that case is no decision in favour of Manitoba even with respect to escheats of land, saying as to this: "Manitoba, when it became a province, was not possessed of any lands, mines, or minerals, and it was provided by section 30 of the Manitoba Act, 33 Vict. c. 3, that all ungranted or waste lands in the province, should, from and after the date of the transfer, be vested in the Crown and administered by the Government of Canada for the purposes of the Dominion, subject to the conditions contained in the agreement for the surrender of Rupert's land by the Hudson Bay Company; from which it would appear to be clear that the 109th section of the British North America Act, 1867, is not applicable to that province;" and he recommended the disallowance of the Act in question.[69]

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[66] (1883) 8 App. Cas. 767. Reported below 5 S. C. R. 538.

[67] See Appendix of Statutes and Orders in Council.

[68] In thus deciding the Privy Council affirmed the decision of the Quebec Court of Queen's Bench in *Attorney-General of Quebec* v. *Attorney-General of Dominion of Canada* (*Church* v. *Blake*) (1876), 1 Q. L. R. 77, 2 Q. L. R. 236, to which decision they make special reference.

'All lands, mines, minerals, and royalties' (continued). Gold and silver mines.—In *Attorney-General of British Columbia* v. *Attorney-General of Canada,* known as the *Precious Metals* case,[70] the Privy Council decided, in conformity with their prior decision in *Attorney-General of Canada* v. *Mercer,*[71] that the word 'royalties' in section 109 includes prerogative rights to gold and silver mines. Their lordships point out that the right of the Crown to land and the baser metals which it contains stands, according to the law of England, (which prevails in British Columbia, with which province they were concerned, so far as not from local circumstances inapplicable), upon a different title from that to which its right to the precious metals must be ascribed; the baser metals being regarded as *partes soli,* or as incidents of the land in which they are found, and no prerogative being given to the Crown in regard to them, whereas all mines of gold and silver within the realm, whether they be in the land of the Crown or of subjects, belong to the Crown by prerogative.[72] And so the Privy Council held in this case that British Columbia, having agreed by the 11th Article of Union to convey, and having accordingly granted by statute to the Dominion parliament, certain 'public lands' in trust to be appropriated in furtherance of the construction of the Canadian Pacific Railway,—this not being matter of a separate and independent compact, but part of a general statutory arrangement, of which the leading enactment was that on its admission to the Federal Union, British Columbia should retain all the rights and interests assigned by those provisions of the British North America Act, 1867, which govern the distribution of provincial property and revenue between the province and the Dominion, the 11th Article of Union being nothing more than an exception from those provisions—though the expression 'land' admittedly carries with it the baser metals, they being incidents of land, it should not be interpreted under the circumstances as derogating from the provincial right to 'royalties' connected with mines and minerals, *e.g.*, mines of gold and other precious metals. Therefore they held that the precious metals within the lands in question remained vested in the Crown, subject to the control and disposal of the Government of British Columbia.[73]

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[69] Hodgins' Prov. Legisl. 1867-1895, at pp. 838-9. See *ibid.* pp. 853, 856. See *supra,* p. 708, n., as to Manitoba lands.

[70] (1889) 14 App. Cas. 295.

[71] (1883) 8 App. Cas. 767.

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[72] But, as in *Attorney-General of Ontario* v. *Mercer*, so in this judgment, their lordships expressly refrain from considering whether 'royalties' in section 109, includes *jura regalia* other than those connected with lands, mines, and minerals.

In *Queen* v. *Farwell*,[74] it was contended that the result of the views thus expressed by the Privy Council was that the lands in the railway belt in British Columbia were still vested in the Crown in right of the province, subject only to the right of the Government of Canada to administer such lands, and to take the revenues therefrom, and that all grants thereof must issue under the Great Seal of the province of British Columbia. Burbidge, J., however, overruled this contention, and held that letters patent for the public lands within the railway belt should issue under the Great Seal of Canada.[75] In this he was affirmed by the Supreme Court, King, J., in delivering the judgment of the Court, saying: "The rights of the Crown, territorial or prerogative, are to be passed under the Great Seal of the Dominion or province (as the case may be), in which is vested the beneficial interest therein. Otherwise they cannot be said to be enjoyed by it, or under its control.'"[76]

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[73] *Cf. Woolley* v. *Attorney-General of Victoria* (1877), 2 App. Cas. 163. And see, also, *Esquimault and Nanaimo R. W. Co.* v. *Bainbridge*, [1896] A. C. 561. When the precious metals have been passed out of the Crown to a grantee, a conveyance of the land by the latter to a third person in the ordinary form will pass the precious metals although not specially mentioned: *Re St. Eugene Mining Co. and The Land Registry Act* (1900), 7 B. C. 288.

[74] (1893-4) 3 Ex. C. R. 171, 22 S. C. R. 553.

[75] See 3 Ex. C. R. at p. 289.

In their recent decision in *Burrard Power Co.* v. *The King*[77] the Privy Council have held that a grant of water rights in the Railway Belt of British Columbia by Water Commissioners purporting to act under the Water Clauses Consolidation Act, 1897, of British Columbia, was invalid, inasmuch as those rights were vested in the Dominion Government, and, therefore, the provincial legislature was precluded from dealing with them. To quote from their lordships' judgment: The 11th Article of the Articles of Union under which British Columbia entered Confederation "stipulated that the Dominion Government should secure the construction of railway communication between the railway system of Canada and the sea-board of British Columbia, and that the Government of British Columbia should convey to the Dominion Government 'in trust to be appropriated in such manner as the Dominion Government may deem advisable in the furtherance of the construction of the said railway,' certain public lands along the line of railway throughout its entire length in British Columbia. . . . The conveyance contemplated by that part of the 11th Article was effected by subsequent statutes of the legislature of the province, and the land so conveyed was known as the 'Railway Belt.'"

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[76] 22 S. C. R. at p. 561.

[77] [1911] A. C. 87, 43 S. C. R. 27, 12 Ex. C. R. 295.

Their lordships' reasons appear from the following extract from their judgment: "The grant by the province of British Columbia of 'public lands' to the Dominion Government undoubtedly passed the water rights incidental to these lands. In the argument addressed to their lordships that was not really questioned. But it was said that, though the proprietary rights of the province in the lands and in the waters belonging thereto were transferred to the Dominion Government, the legislative powers of the province over the same, neither were, nor could be, parted with, and that, therefore, it was competent for the provincial legislature to enact the Water Clauses Act, 1897, under which the record,[78] was granted. In support of that contention a passage was cited from Lord Watson's judgment in the *Attorney-General of British Columbia* v. *Attorney-General of Canada.*[79] Their lordships are of the opinion that the contention was wrong and that the passage in Lord Watson's judgment affords no kind of support for it. The object of Article 11 of the terms of Union was, on the one hand, to secure the construction of the railway for the benefit of the province, and, on the other, to afford the Dominion a means of recouping itself in respect of the liabilities which it might incur in connection with the construction by sales to settlers of the land transferred. To hold that the province after the making of such an agreement remained at liberty to legislate in the sense contended for would be to defeat the whole object of the agreement, for if the province could by legislation take away the water from the lot, it could, also, by legislation resume possession of the land itself, and therefore so derogate from its own grant as to wholly destroy it. Lord Watson's reference in the *Precious Metals* case to the 11th Article so far from supporting the appellants' contention is against it. He said: ' The conveyance contemplated was a transfer to the Dominion of the provincial right to manage and settle the lands, and to appropriate their revenue.' The grant of the water record in the case now under consideration was an attempt on the part of the province to appropriate the revenues to itself, and would, if carried into effect, violate the terms of the contract, as interpreted by Lord Watson. It was true that Lord Watson added that the land was not by the transfer taken out of the province, and that once it was " settled " by the Dominion it ceased to be public land, and ' reverts to the same position as if it had been settled by the provincial Government in the ordinary course of its administration.'[80] But that, also, was against the appellants' contention, for it implied that until settled by the Dominion it remained public land under the Dominion control. Their lordships were of the opinion that the lands in question so long as they remained unsettled were ' public property ' within the meaning of section 91 of the British North

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[78] *I.e.*, a record or grant under the Water Clauses Consolidation Act, 1897.

[79] (1889) 14 App. Cas. 301, known as the *Precious Metals* case.

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[80] *Cf. McGregor* v. *Esquimalt and Nanaimo R. W. Co.* (1907), A. C. 462.

America Act, 1867, and as such were under the exclusive legislative authority of the parliament of Canada by virtue of the Act of parliament. Before the transfer they were public lands, the proprietary rights in which were held by the Crown in right of the province. After the transfer they were still public lands, but the proprietary rights were held by the Crown in right of the Dominion, and for a public purpose, namely the construction of the railway. That being so, no Act of the provincial legislature could affect the waters upon the land.

' All lands, mines, minerals, and royalties.' Ferries.—In *In re International and Interprovincial Ferries,*[81] the Supreme Court as we have seen,[82] held that the parliament of Canada had authority to, or to authorise the Governor-General in Council to establish or create ferries between a province and any British or foreign country or between two provinces, notwithstanding the contention resting on the decision of Street, J., in *Perry* v. *Clergue,*[83] that a ferry is an incorporeal hereditament, and that the right to grant a ferry is one of the prerogatives of the Crown, and a ' royalty ' within the meaning of section 109 of the British North America Act and, therefore, belonged to the province. At pp. 219-220, Nesbitt, J., with whom Sedgwick, and Girouard, JJ., concur, says: "I do not find any Court has laid down the rule that a mere right to create something, a mere authority to bring into being a corporate entity or privilege, or anything of that character for which a fee could be charged, is a 'royalty' within section 109, but I would rather place such a right under sections 12, and 108, than under 109.[84] It seems to me, therefore, that the authority to create a ferry of the character in question is vested in the Dominion, and exercisable under sections 12 and 91 of the British North America Act.''[85]

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[81] (1905) 36 S. C. R. 206.

[82] *Supra*, pp. 264; 698.

[83] (1903) 5 O. L. R. 357.

At p. 213, Nesbitt, J., points out that at the time of the enactment of the British North America Act, the right to issue a license for a ferry was in no sense the same as the title to land; that the Crown had abandoned certain prerogative rights leaving them to the control of the legislatures, such as granting of charters; and that the exercise of such a power by the Crown, certainly in the colonies, might be treated as obsolete; and therefore, when the subject of ferries was mentioned it covered the power or authority to create the ferry, which only when created became a species of property."

'Subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.'[86] The Privy Council had occasion to construe these concluding words of section 109 of the British North America Act in the *Indian Claims* case.[87] In 1850 certain Indians inhabiting districts now included in the province of Ontario, entered into treaties with the Government of the province of Canada, acting on behalf of Her Majesty and the Government of the province, for the cession of certain tracts of lands, which had until that time been occupied as Indian reserves, and the lands were, accordingly, surrendered in consideration of certain sums paid down and certain perpetual annuities, and on the further term and agreement that in case the territory ceded should at any future period produce an amount which would enable the Government of the province, without incurring loss, to increase the annuities, then and in that case the same should be increased from time to time on the scale therein provided; and the question was whether such right to augment an annuity constituted a 'trust' or 'interest' in respect to the lands in favour of the Indians, within the meaning of section 109. The judgment states: "The expressions 'subject to any trusts existing in respect thereof,' and 'subject to any interest other than that of the province' appear to their lordships to be intended to refer to different classes of right. Their lordships are not prepared to hold that the word 'trust' was meant by the legislature to be strictly limited to such proper trusts as a Court of Equity would undertake to administer; but, in their opinion, must, at least, have been intended to signify the existence of a contractual or legal duty, incumbent upon the holder of the beneficial estate, or its proceeds, to make payment, out of one or other of those, of the debt due to the creditor to whom that duty ought to be fulfilled. On the other hand, 'an interest other than that of the province in the same' appears to them to denote some right or interest in a third party, independent of, and capable of being vindicated in competition with, the beneficial interest of the old province. Their lordships have been unable to discover any reasonable grounds for holding that by the terms of the treaties any independent interest of that kind was conferred upon the Indian communities. . . . Their lordships have had no difficulty in coming to the conclusion that under the treaties the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement which was nothing more than a personal obligation by its Governor, as representing the old province, that the latter should pay the annuities as and when they became due; that the Indians obtained no right which gave them any interest in the territory which they surrendered other than that of the province; and that no duty was imposed upon the province, whether in the nature of a trust obligation, or otherwise, to apply the revenue derived from the surrendered lands in payment of the annuities."[88]

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[84] See Appendix of Stautes and Orders in Council.

[85] See, also, No. 13 of section 91 which gives the Dominion parliament exclusive power of legislation in relation to 'ferries between a province and any British or foreign country, or between two provinces.' *Supra*, pp. 263-4.

[86] As to the application of these words to the Indian title, see *supra*, p. 297, and *infra*, pp. 734-6.

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[87] *Attorney-General for the Dominion of Canada* v. *Attorney-General of Ontario*, [1897] A. C. 199; reported below 25 S. C. R. 434. This was an appeal from the award of certain arbitrators appointed for the final determination of questions which had arisen on the settlement of accounts between the Dominion of Canada and the provinces of Ontario and Quebec, on the basis of those provisions of the British North America Act (namely, sections 109, 111, 112, and 142) which relate to the incidence, after the Union, of the debts and liabiliites of the old province of Canada. After the decision of the Privy Council that Ontario was not solely liable in respect to the above annuities, the Dominion presented a new case before the Arbitrators against Ontario and Quebec jointly, who made an award holding Ontario and Quebec jointly liable. An appeal was taken to the Supreme Court (1898), 30 S. C. R. 151, but dismissed. See, also, in connection with the same proceedings, *Attorney-General for Ontario* v. *Attorney-General for Quebec*, [1903] A. C. 38, 31 S. C. R. 516; *Attorney-General for Quebec* v. *Attorney-General for Ontario*, [1910] A. C. 627, 42 S. C. R. 161.

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[88] In the course of the argument in this case, Lord Watson is reported as saying of section 109: "If the Crown right was subject to a burden upon the lands, the interest is to pass to the province under that burden. There was to be no change in the position of the Crown. I think the whole effect of this clause is to appropriate to the province of Ontario all the interest in lands within that province as vested in the Crown:" Transcript from shorthand notes, 1st day, p. 27. And, in another place, he says: "The policy of these sections of the Act, 109, 111, 112, and 142, when read together appears to me to be generally this, beyond all dispute. The intention obviously was to provide that with regard to all those debts and liabilities of the old province of Canada, which were simply debts and liabilities charged generally upon the revenues of the provinces, the creditors were to be paid by the Dominion, and to a certain extent, in excess of a particular sum, the Dominion was to be recouped by the two new provinces in the proportions which might be determined under the provisions of section 142. On the other hand to this extent it is made very plain under section 109 that any debt or liability which was made a proper charge upon any property or assets passing to the province under section 109, was to remain that charge, and was not to be satisfied by the Dominion Government under section 111:" *Ibid.* at pp. 84-85. In his judgment in this case in the Supreme Court, 25 S. C. R. at pp. 524-5, Gwynne, J., says: "The estate of Her Majesty in the ungranted lands of the Crown in the province never were, nor were supposed to be, nor, indeed, could be, subject to any such trust." But as to Crown lands being bound by a trust, see per Strong, V.C., in *Canada Central R. W. Co.* v. *The Queen* (1873), 20 Gr. at pp. 289-90; per Killam, J., in *Canadian Pacific R. W. Co.* v. *Rural Municipality of Cornwallis* (1890), 7 Man. at pp. 21-3; and *McQueen* v. *The Queen* (1887), 16 S. C. R. at pp. 58, 117. Also per Osler, J., in *Booth* v. *McIntyre*, *infra*, p. 737. And *Attorney-General of British Columbia* v. *Esquimalt and Nanaimo R. W. Co.* (1912), 19 W. L. R. 693, 21 W. L. R. 549.

Such a 'trust' or 'interest' as is referred to in section 109 was found in *Booth* v. *McIntyre*,[89] to be the right possessed by the Canada Central Railway Company, under its charter, comprised in Acts of the old province of Canada, to pass over any portion of the country between limits mentioned therein, and carry the railway through the Crown lands lying between the same. "The Crown lands through which the railway passed," says Osler, J., delivering the judgment of the Court, "were subject, it may be said, to a trust existing in favour of the company so long as they remained Crown lands, and to the interest of the company, being an interest other than that of the province in the same."

By statute of the old province of Canada, 12 Vict. c. 200, s. 3, 1,000,000 acres of the public lands of the province of Canada were to be set apart to be sold and the proceeds applied to the creation of the common school fund provided for in section 1. The lands so set apart were all in the present province of Ontario. It was held in *Provinces of Ontario and Quebec* v. *Dominion of Canada*,[90] that the trust in these lands created by the Act for the common schools of Canada did not cease at Confederation so that the unsold lands and proceeds of sale should revert to Ontario, but such trust continued in favour of the common schools of the new provinces of Ontario and Quebec.[91]

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[89] (1880) 31 C. P. at pp. 193-4.

[90] (1898) 28 S. C. R. 609.

[91] In *In re Provincial Fisheries* (1896), 26 S. C. R. at p. 509, Girouard, J., observes that it had been suggested that "the

Controversies between the Dominion and provinces must be dealt with on recognised legal principles. — By section 32 of the Exchequer Court Act, R. S. C. 1906, c. 140, it is enacted that:

32. When the legislature of any province of Canada has passed an Act agreeing that the Exchequer Court shall have jurisdiction in cases of controversies:—

(*a*) between the Dominion of Canada and each province;

(*b*) between such province, and any other province, or provinces, which have passed a like Act;

the Exchequer Court shall have jurisdiction to determine such controversies.

2. An appeal shall lie in such cases from the Exchequer Court to the Supreme Court.

This seems the most appropriate place to notice the decision of the Privy Council in *Do-*

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ownership of the lands covered by sea within the three miles limit . . . and of all lands covered by tidal waters is subject, under section 109 of the British North America Act, to a 'trust' or 'interest' created by Magna Charta in favour of the public, which, since Confederation, is held and represented by the Dominion, for the benefit of the people of the Dominion at large, and is under the control of the Dominion parliament. But he says that the contention is not maintainable, and points out that even if the provisions of Magna Charta could be held to constitute any such 'trust' or 'interest,' the public interested in the foreshore fisheries before Confederation was the public of the province which held the same for its benefit only, and not the public of the Dominion, which had no existence. It does not seem clear that before June 29th, 1865, when the Colonial Laws Validity Act was passed, any colonial legislature had power to interfere with Magna Charta." See the Article on the competence of colonial legislatures to enact laws in derogation of common liability or common right, by T. C. Anstey, published in papers read before the Juridical Society, Vol. 3, p. 401 (1868), especially at p. 404. As to the three mile limit see, further, *supra* p. 723, n.

minion of Canada v. *Province of Ontario*,[92] a case which has been already referred to at some length,[93] that when a dispute between the Dominion and a province of Canada, or between two provinces, comes before the Exchequer Court under the above provisions, it should be decided on a rule or principle of law, and not merely on what the judge of the Court considers fair and just between the parties. In so deciding their lordships were affirming the Supreme Court, and they say, (p. 645): "The Court of Exchequer, to which by statutes both of the Dominion and the province a jurisdiction has been committed over controversies between them, did not thereby acquire authority to determine those controversies only according to its own view of what in the circumstances might be thought fair. It may be that, in questions between a Dominion comprising various provinces of which the laws are not in all respects identical, on the one hand, and a particular province with laws of its own, on the other hand, difficulty will arise as to the legal principle which is to be applied. Such conflicts may always arise in the case of States and provinces within a union. But the conflict is between one set of legal principles and another. In the present case it does not appear to their lordships that the claim of the Dominion can be sustained on any principle of the law that can be invoked as applicable."[94]

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[92] [1910] A. C. 637, 42 S. C. R. 1, 10 Ex. C. R. 445.

[93] *Supra*, p. 714.

[94] See, also, on the point that disputes between the Dominion and the provinces must be decided on legal principles: *Attorney-General of Ontario* v. *Attorney-General of Canada* (1907), 39 S. C. R. 14, 10 Ex. C. R. 293.

CHAPTER XXX.

THE CONCLUSION OF THE MATTER.

He who studies the British North America Act in the light of the decisions which have interpreted it, and the discussions which have arisen under it, is likely to rise from his labours strongly impressed in respect to three points. The first of these is the statesmanlike foresight, and subtle cleverness with which the Act was drawn. In order to appreciate this let us first consider what it was which the Fathers of Confederation set themselves out to accomplish. Much had been achieved already. As Lord Durham says in his famous Report—'It is difficult to understand how any English statesman could have imagined that representative and irresponsible government could be successfully combined.' This phase had passed away some twenty years before Confederation. The *crux* which had at one time seemed so insoluble even to Lord John Russell himself,[1]—how the position of a Governor as the representative of the Crown, could be reconciled with colonial responsible government,—had found its solution in the recognition of the fact that Imperial interests and Imperial concerns could, with no great difficulty, be distinguished from local interests and local concerns; and since 1848 the provinces of Canada, Nova Scotia, and New Brunswick had enjoyed responsible parliamentary self-government. But now British North America was to cease to be a group of separate colonies, and was to take on the form of a Canadian nation within the Empire. To say that the whole task of the founders of our Constitution was to combine responsible government with a federal system, while maintaining undisturbed the Imperial connection, is to express the matter very inadequately. Their task was to preserve the Imperial connection, and, at the same time, to endow the new Canadian nation with a polity which embodied the principles of the British Constitution in their most advanced and perfect form, but left Canadians free to develop those principles in their own way, and in accordance with their own needs. A British people brought up to a knowledge and admiration of those principles, could not be expected permanently to acquiesce in a polity less liberal and less expansive than that enjoyed by the people of Great Britain itself; nor could in any other way Lord Elgin's dream be realized, and Canada become " such a country as might so fill the imagination and satisfy the aspiration of its sons, that the danger of absorption with its great neighbour might be for ever set to rest."[2] If things were never again to be put into the melting pot,—if there was to be no future stirring up of foundations,—a Constitution must be given to the Dominion which her sons might be satisfied with 'while the British name lasts.'[3]

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[1] 'It may happen that the Governor receives at one and the same time instructions from the Queen, and advice from his executive Council, totally at variance with each other. If he is to obey his instructions from England, the parallel of constitutional responsibility entirely fails; if, on the other hand, he is not to follow the advice of his Council, he is no longer a subordinate officer, but an independent Sovereign:' Letter from Lord John Russell to the Governor-General of October 14th, 1839: Egerton and Grant's Constitutional Documents, page 267.

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[2] Cited Egerton's Short History of British Colonial Policy, p. 373.

Little was to be gained, except by way of warning, from the Constitution of the United States.[4] The fundamental divergence from that precedent involved in the retention of parliamentary responsible government alike in respect to the Dominion and the provinces, in place of the separation of governmental powers, need not be dwelt upon here at any length.[5] 'The founders of the American Constitution,' says Lord Morley, in his delightful life of Robert Walpole[6] 'as all know, followed Montesquieu's phrases, if not his design, about separating legislature from executive, by excluding Ministers from both Houses of Congress. This is fatal to any reproduction of the English system. The American Cabinet is vitally unlike our own on this account.'

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[3] 'The British-American colonist, who earnestly hopes, as the bulk of them do, that the connexion may continue while the British name lasts:' Sir J. B. Robinson in 'Canada and the Canada Bill.' As Lord Elgin—whose wisdom and insight in the matter of colonial government is so conspicuous in all his letters and despatches—said in a letter to the Duke of Newcastle of March 26th, 1853:—' There is nothing in British connection to check the development of healthy national life in these young communities:' Egerton and Grant, *op. cit.* pp. 328-9.

[4] For a detailed comparison of the Canadian and United States Constitutions I may, perhaps, be permitted to refer to the introductory chapter of my 'Law of Legislative Power in Canada.'

[5] Those who wish to appreciate justly the advantages of the British system over the American, cannot do better than consult the little work on 'Congressional Government' (Boston, 1887), by the present President of the United States, Mr. Woodrow Wilson. See, also, Story's Commentaries on the American Constitution, 4th ed., Vol. 1, p. 614 *et seq.*

[6] Twelve English Statesmen Series, p. 154.

It would not, however, seem that the Americans deliberately adopted their present system in preference to our existing British system. The principle of Cabinet Government, says Mr. Hearn, in his work on the Government of England, seems to have been altogether unknown in America at the time of the Revolution.[7] In truth it had not then really developed itself even in England. There is no instance before 1830 of a Ministry retiring because it was beaten on a question of legislation or even of taxation.[8] The Constitution of the United States, as Sir Henry Maine long ago pointed out,[9] is in reality a version of the British Constitution, as it must have presented itself to an observer in the second half of the 18th century. The present British system of Cabinet government was exactly the method of government to which George III. refused to submit, and the framers of the American Constitution took George III.'s view of the Kingly office for granted. They give the whole executive government to the President, and they do not permit his Ministers to have seat or speech in either branch of the legislature.

But when we examine the scheme and methods of the British North America Act we see that, quite apart from this matter of responsible government, its framers never forgot the promise of its preamble to federally unite the provinces into one Dominion 'with a Constitution similar in principle to that of the United Kingdom.' We have noticed in the course of this work many divergencies from American ideas and institutions in which the founders of Confederation faithfully followed by preference, and with much ingenuity, British principles.[10] We may briefly summarize here the principal points to be observed in this connection. We find in the British North America Act no such hampering and restricting of legislative action by provisions of a fundamental law as is found in the Constitution of the United States,—a thing which, whether it be wise or unwise, is, and was in 1867 when that Act was passed, quite foreign

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[7] Government of England, p. 213. See, however, *contra* Baldwin's Modern Political Institutions, p. 32.

[8] Anson on the Crown, 2nd ed., pp. 137-8.

[9] Popular Government, pp. 207, 212, 213.

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[10] *E.g.*, pp. 9, n.; 65-7; 82; 84; 88; 95-6; 239; 391. Some interesting passages, as shewn by the *verbatim* report, occurred in reference to the United States Constitution upon the argument before the Privy Council in *Union Colliery Co. of British Columbia* v. *Bryden*, [1899] A. C. 580. The following may be extracted here:—

Mr. Blake: "I submit I am entitled to look to the actual fact of the existence of the American Constitution and to its terms."

Sir E. Fry: "We do not care about the American Constitution, and we do not even know it exists. How do you prove it?"

Lord Watson: "You do not get the Governor-General and the Lieutenant-Governor in the American Constitution."

Mr. Blake: "No." . . .

Lord Watson: "There is nothing analogous to the division of authority,—is there?—in the United States . . . The decisions of the United States are well worth studying. I have read a great many of them, but I am bound to say this, that I think with all deference, and admitting their great ability, the Courts of the United States take greater liberties with the Constitution than we are likely to do. They occasionally take liberties with the Constitution we should not think of doing, and which we should not think ourselves capable of doing. . . . I have had occasion more than once to say in cases of this kind in the Privy Council that I should like to understand what bearing the observations of the (United States) Courts have upon the provisions to the principles of the British Constitution, which prefers to protect the liberty of the subject without destroying the freedom of action of the legislature. The framers of our Constitution could not, of course, create a legislature precisely similar to the parliament in Great Britain in respect to supreme control over all matters whatever in Canada, because they were bringing into existence, not a legislative union, but a federal union of the provinces. They adhered, however, as closely as possible to the British system in preference to that of the United States. They distributed all legislative power whatever over the internal affairs of the Dominion between the Federal parliament on the one hand, and the provincial legislatures on the

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of the Act of 1867. I should like to know whether the learned judges ever dreamed of such a statute as the British North America Act of 1867. We have had no end of observations in the United States cases cited here, and I have not yet come across ten lines that have the least reference to that subject or language that was used in reference to that statute." . . .

Sir E. Fry: "Is it any use to cite decisions of another Constitution in reference to this? This is, I should say, a plain Act of Parliament." . . .

Lord Watson: "We are apt to get into the *mare magnum* of State policy. What have we to do with that?"

Lord Hobhouse: "They have not two documents of this kind in the United States portioning out legislative jurisdiction between two bodies. This is essentially different." . . .

Lord Watson: "I will not pretend to be learned on the subject, but I have read a little American law and constitutional law, and I can only say this: My impression arising from the study of it has always been that there is very little similarity, still less identity, between the American Constitution . . . and the Act of 1867. We require to see the bearing of it. If you fail in satisfying us that there is any analogy that can be proceeded upon you have only failed where very distinguished counsel in the same case have failed before you. . . ." (Transcript from Shorthand Notes of Martin Meredith and Henderson).

other. They did not merely grant certain legislative powers to the Federal parliament, leaving subject to them the legislative powers of the several provinces intact, as is the case with Congress, but they specified certain broad subject-matters over which the provinces should have the same exclusive power as the Dominion parliament was to have over its own enumerated subjects, though, indeed, in the case of irreconcileable conflict between laws made under overlapping powers, Dominion legislation, it has been decided, must predominate.[11] They gave, moreover, both to the Dominion and the provincial legislatures, not merely power to do certain things and make all laws necessary and proper for carrying such powers into execution, as in the case with Congress,[12] but the wide power to 'make laws in relation to' the various broad *subject-matters* of legislation committed to their respective jurisdictions. They gave them that power in each case, not as mere delegates or agents—which is the position of American legislatures[13]—not subject to all manners of fundamental restrictions,—but authority as plenary and as ample within the limits prescribed, as the Imperial parliament in the plenitude of its power, possessed or could bestow.[14] They recognized no reserve of power either in the people of the Dominion at large, or in the people of the provinces in particular, any more than such reserve is recognized under the British Constitution, although it is under the American.[15] Between the Dominion parliament and the provincial legislatures was distributed all power whatever over the government of the internal affairs of the country in every respect. They rounded off and completed the powers of the Dominion parliament over federal matters by bestowing upon it a general residuary power to make laws for the peace, order and good government of the country in relation to all non-provincial subjects, thus making it,—not like Congress, which has no such residuary power,—but like the parliament of the United Kingdom so far as all such matters are concerned.[16] In like manner, also, they rounded off and completed the power of provincial legislatures over provincial matters by giving them residuary power over 'generally all matters of a merely local or private nature in the province.' Furthermore, and still adhering to British analogy, the framers of the Constitution made the respective powers of parliament and the provincial legislatures, not concurrent as are for the most part federal and State powers in the United States,[17] but exclusive in each case the one of the other, thus making the parliamentary bodies they were creating each supreme in its own domain. In framing the fundamental law of the Dominion they restrained their hands[18]—in indicating the classes of subjects in relation to which Dominion or province respectively might legislate, they purposely used vague general language, and overlapping descriptions—and thus allowed as free scope, or in the nature of the case was possible, for that process of organic growth of the national institutions, in harmony with national needs and circumstances, which is one great virtue of the Constitution of the United Kingdom.[19] In a word, they did their best to secure to Canadians as a heritage for ever the precious forms of British liberty.

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[11] See *supra*, pp. 118-120; 123-127; 191.

[12] Constitution of the United States, Art. 1, secs. 8, 93 and 95.

[13] Story on the Constitution, 5th ed., Vol. 2, p. 567; Federalist (Knickerbocker ed.), No. 46, at p. 292.

[14] See *supra*, pp. 64-74.

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[15] Constitution of the United States, Amendments, Art. 10.

[16] It was this gift of a general residuary power to the Dominion parliament of which Sir John Macdonald, in the debate in the parliament of the old province of Canada on the motion to adopt the Quebec Resolutions, said:—"This is precisely the provision which is wanting in the Constitution of the United States. It is here that we find the weakness of the American system—the point where the American Constitution breaks down. It is in itself a wise and necessary provision. We thereby strengthen the Central parliament, and make the Confederation one people and one Government instead of five peoples and five Governments, with merely a point of authority connecting us to a limited and insufficient extent:" Egerton and Grant's Canadian Constitutional Documents, p. 389.

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[17] Story on the Constitution, 5th ed., Vol. 1, p. 335.

[18] 'The very inflexibility of the Constitution tempts legislators to place among Constitutional articles maxims which (though not in their nature constitutional) have special claims upon respect and observance:' A. V. Dicey in Article on Federal Government, L. Q. R. Vol. 1, pp. 86-7.

[19] As Mr. Egerton says:—'No attempt is made to crystallize by statutory enactment the flexible system of precedents and conventions which make up the customary law of the British Constitution:' History of Canada, p. 240. For passages in this book illustrating the subtle and far-seeing statesmanship displayed in such ways in the draughtsmanship of the British North America Act, see *supra*, pp. 9, n 5; 86-8; 96; 134, n. Confounded by the question, propounded by a friend, as to who was really entitled to the credit of the ability thus displayed in the drawing of the Federation Act, I have endeavoured to be better prepared in future to answer the question. There may be no doubt that, as stated in a private letter from Sir Joseph Pope, of November 8th, 1912, which I am permitted to quote,—'The guiding and controlling mind and hand at the Conference which evolved the British North America Act, were those of Sir John Macdonald,'—but as to the niceties of the draughtsmanship, the true answer would seem to be found in the following passages in a letter from Z. A. Lash, K.C., in response to the writer's enquiries, which, also, I am permitted to quote:—'With reference to the draughtsmanship of the British North America Act, I can, I think, confirm

But in respect to the distribution of legislative power between the Dominion and the provinces, the framers of our Constitution advisedly departed from that of the United States in many particulars besides the conferring of a general residuary legislative power upon the Dominion parliament. The subject was treated so ably, and with so much authority, by Mr. Z. A. Lash in an Address before the Toronto Board of Trade

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your impression that for the draughting of the Act in its final shape credit should be given to Lord Thring and his Department. Why I think I can confirm your impression is because, when I was Deputy Minister of Justice at Ottawa, the question of Lord Thring's ability as a parliamentary draughtsman came up in connection with some matter in which the Department of Justice was concerned, and the fact that he had put the final touches upon the British North America Act was mentioned. Of course the rough draught of the Act was made in Canada, but I learned in the conversation referred to, that after our representatives had taken it to England, it was put into final shape after discussion and consideration with Lord Thring, and in the conversation his cleverness as a draughtsman and his far-sightedness in connection with this particular measure were referred to. Of all this I have a distinct recollection. What I do not remember clearly is—who were present during this conversation. My impression is that Sir John Macdonald himself took part in it. If it were not Sir John it was probably Sir Alexander Campbell, who was Minister of Justice during part of the time I was in Ottawa. . . . Lord Thring's duty would be confined to carrying out in proper shape the basis embodied in the draft submitted to him for revision and the recasting. I agree with you that much cleverness and subtlety were shewn in the draughting of the Act as it was finally passed.' So, also, Mr. E. L. Newcombe, the present Deputy Minister of Justice, writes in a letter of November 25th, 1912:—'In 1861 Lord Thring became Counsel to the Home Office, and this position afterwards developed into that of Parliamentary Counsel, so that I think you can make no mistake in supposing that he would be the Government draughtsman to pass upon the British North America Act in so far as any Imperial draughtsman was concerned.'

in 1912,[20] that I make no apology for quoting therefrom at length:—

"Contrast the position of the thirteen States in 1787 with that of the three Colonies which in 1867 became federated as the Dominion of Canada, viz.: the province of Canada—then Upper and Lower Canada, but united by a legislative union—the province of New Brunswick, and the province of Nova Scotia. In the first place, they had not thrown off their allegiance to Great Britain, and they did not feel, as did the thirteen Colonies, that having thrown off one power they would not set up another over them, even of their own making. They met to form a Union, which on its very face made provision for including the northern half of this continent. They had before them the example of the United States of America as a guide and as a warning. They knew something about the weaknesses of that Constitution, and they knew the strong points of the Constitution of Great Britain. They knew the effect upon trade of railways and telegraphs and modern means of transportation and communication. They did not come to discuss a union as independent States anxious to retain all their sovereign powers and to give to the new Dominion such powers only as seemed necessary to the scheme, reserving to themselves all balance of power, but they met to form a union which would in the near future possess and govern Canada from coast to coast, and which would have to deal with the problems of Empire and solve difficulties which had confronted the United States. Like the United States, they decided upon a federal union creating a central legislative and executive power, and creating provinces which would control their local affairs, but, unlike the United States, they conferred upon the Dominion general powers to make laws for the ‘ peace, order and good government of Canada,’ and carved out of this general power certain specified powers which they conferred upon the provinces. These specified powers have proved sufficient for all practical local purposes, and with no expressions of dissatisfaction worth mentioning as to the division of legislative authority between the Dominion and the provinces, our people are happy and contented with the Canadian Constitution. The great difference in principle between the United States and the Canadian federation is that in the United States the federal authority has only specified powers, the whole balance being possessed by the States, whereas in Canada the provinces have the specified powers and the whole balance is possessed by the Dominion. The working out of this difference makes apparent every day defects in the United States Constitution and advantages in ours.

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[20] Published in "The Canadian Countryman" for November 16th, 1912. See, also, *supra*, p. 134, n. 2.

“ I quote from the recital in the British North America Act, 1867:—‘ Whereas the provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland with a Constitution similar in principle to that of the United Kingdom.’

" As we all know, the great principle which ran through that constitution in 1867 was that, though a monarchy, the people rule. This great principle runs through the Constitution of Canada.

" The law-making power of the Dominion is conferred in these words:—' It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.'

" This is a general grant, and carries with it legislative power over all classes of subjects the power over which has not by the Act been exclusively granted to the provinces. There are various subjects upon which defects in the United States Constitution exist, and which defects are not to be found in the Constitution of Canada. I shall illustrate by four only, viz., Trade, Transportation, the Criminal Law, Marriage and Divorce.

" In the United States, the specified jurisdiction over trade is conferred upon the federal body in these words,—' To regulate commerce with foreign nations and among the several States and with the Indian tribes.' In Canada it belongs to the Dominion under the general grant, because it has not been conferred upon the provinces; but for greater certainty and not so as to limit the general grant the Act specially declares that the legislative authority of Canada includes ' the regulation of trade and commerce.'

"In the United States the general criminal law comes under the jurisdiction of the States because it has not been specially granted to the central authority; so also do 'Marriage and Divorce,' whereas in Canada these subjects belong to the Dominion because they have not been specifically granted to the province, and 'for greater certainty,' they are named as part of the Dominion jurisdiction.

"I mention these particular subjects because they are of constant general interest, and it is easy to illustrate the defects of the United States Constitution regarding them and the advantages of our own.

"Take the subject of trade, and of transportation, which is so intimately connected with it. It does not require much consideration to see that to regulate efficiently the trade of a country the size of Canada or the United States, where the question of transportation and freight rates is of such vital importance, where discrimination may enrich one industry or section and ruin another, and where huge combinations may practically monopolize the necessaries of life, both in foods and manufactures, there should be one general legislative power capable of dealing with all the important questions which are involved. In Canada we have such power in the Dominion parliament. In the United States the power which Congress possesses is confined to that species of commerce which is with foreign countries, among the several States, and with the Indian tribes. This power is far short of what is required to successfully cope with the evils connected with trade and transportation which have grown up in the States. Attempts to cope with them have been made by Congress, but so far they have been only partially successful, owing, I believe, mainly to the difficulty, if not the impossibility, of framing effective laws because of the defective jurisdiction which is vested in Congress. Each State has power to regulate trade and transportation within its own borders. It is, in fact, only by implication that Congress has any jurisdiction over State railways, and this implied jurisdiction extends only so far as it can be said to be a regulation of commerce among the several States or with foreign nations.

" With respect to trade which begins and ends within a State, Congress is practically powerless. 'Tis true that our provinces, like the various States, have power to incorporate railways to operate in the province, and to regulate their tariffs and their business, and to establish commissions for that purpose, but this power is contained in the grant of legislative authority over 'local works and undertakings' and 'the incorporation of companies with provincial objects.' To complete the jurisdiction of the Dominion over local works and undertakings express power is vested in the parliament of Canada to declare a local work or undertaking to be for the general advantage of Canada or of any two or more of the provinces, and upon such declaration being made, Parliament has jurisdiction over it.[21] No such power is vested in Congress with respect to works within a State. Bear in mind, too, that in Canada the power to regulate trade and commerce is vested in the Dominion parliament and not in the provinces.

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[21] See *supra*, pp. 364-371.

" With respect, therefore, to the two great subjects of trade and transportation, a newcomer from the United States of America comes to a country where under its Constitution power exists to pass efficient laws to guard against the evils which exist in the country he comes from, and he may well be satisfied with the change. This power has been exercised already in important instances, such as the Act creating an all powerful Railway Commission and the Act relating to the investigation of injurious trade combinations. Clear power exists to make such amendments and additions to these Acts as the public interests may from time to time require.

" Turn now to the Criminal Law. In Canada, complete jurisdiction over it and over the procedure in criminal matters is vested in the Dominion parliament, whereas in the United States each State possesses this power, with the result that their criminal laws and procedure differ, and differ widely in some instances, not only as to what constitutes a crime but as to the trial of the offender and his punishment.

" We have not in Canada the scandals and delays and perversions of justice which are constantly in evidence in the States, in connection with criminal trials. Our criminal procedure is prompt and sure. Crime does not go unpunished, and no lynchings, because the power of the law fails, take place. No one can say of Canada, as

President Taft felt constrained to say publicly of the United States,—' I grieve for my country to say that the administration of criminal law in all the States of this Union (there may be one or two exceptions) is a disgrace to our civilization.'

" Courts and judges and the administration of justice here are more respected by the people generally than they are in the States, and our criminal justice is more promptly administered, but I firmly believe that, if the United States Constitution had granted to the central authority exclusive power over criminal law and procedure, Congress would have enacted such laws, applying to the whole country, as would have gone far to obviate the scandals and delays and perversions of justice and lynchings, and to make it impossible for any President of that great nation to utter the lament I have quoted.

" As with the subject of trade and transportation, so with that of ' criminal law and procedure,' a new comer from the United States may well feel satisfied with the change.

" Take the subject of ' Marriage and Divorce.' In the United States each State has full jurisdiction over it. In Canada the jurisdiction is vested in the Dominion parliament. The provinces have authority over ' the solemnization of marriage in the province ' only. As with the administration of criminal justice, we have not in Canada the scandals and disgrace which prevail in many of the States in relation to marriage and divorce, especially divorce. The conditions which there prevail, and which are a humiliation to their best and right-thinking people, are not possible in Canada. Polygamy could never be recognized or encouraged by the law, as it is in Utah.[21a] The sacredness of the marriage tie could never be treated with such levity as it is treated with in some of the States. Can there be any doubt that over a subject so vital to the continued well being of a people, the central authority, which represents all the people and not merely a State or province, should have the jurisdiction? As in the case of criminal law and procedure, I firmly believe that if the United States Constitution had granted to the central authority exclusive power over marriage and divorce, Congress would have enacted such laws, applicable to the whole country, as would have prevented that special blot which now blackens the most sacred side of their social life. Certainly, with regard to marriage and divorce, the right-thinking new-comer from the United States may feel satisfied with the change.

"I would like to explain the differences between the United States Constitution and ours relating to banking, but to do so would occupy too much of the time allowed for this Address. I can only assert my belief that if Congress had possessed from the beginning the same complete legislative authority over this subject, extending over the whole of their country, as is possessed by the Dominion parliament, extending over the whole of Canada, they would have been better equipped to deal efficiently with their banking system, and to remedy or even prevent the evils which now are associated with it. They could have created one uniform system for the whole country. As it is, each State has power to create banks and pass laws respecting their business, so that one uniform system is now practically impossible. In Canada, the Dominion parliament has complete and exclusive authority over 'banking, the incorporation of banks, and the issue o paper money.' I am convinced that, had there been in Canada a divided jurisdiction over this subject, it would not have been possible to create and continue and improve from time to time, the Canadian banking system, which is the envy of our friends to the south, and which has done and is doing so much for the welfare and development of our country."

[21a] This is a little misleading. When in 1896 Utah was admitted into the Union, one of the conditions made by Congress was that polygamy should be forbidden by the State; and that this prohibition should be repealable only with the consent of the United States and of the people of the State. This was done: see Art. iii. of the State Constitution, under which 'polygamious or plural marriages are for ever prohibited:' Ency. Brit., 11th ed., Vol. 18, pp. 846-7, *sub voc.* 'Mormons.'

The second point with which the student of our Federation Act and the decisions under it cannot fail to be impressed, is the splendid work done upon the interpretation and development of our constitutional system by the Judicial Committee of the Privy Council,[22] assisted, of course, by the preliminary discussions and judgments of our own Courts. The plenary power of Canadian legislatures over the internal affairs of the Dominion, so that in all matters of self-government, anything which is not within the power of the Dominion parliament is within the power of the provincial legislatures, and *vice versa*,—the paramount authority of the federal parliament when legislating within its proper sphere in case of irreconcileable conflict with provincial legislation,—and the right, at the same time, of provincial legislatures to legislate under their own proper powers, even though by so doing they may limit the range which would otherwise be open to the Dominion parliament,—the principle that legislation which in one aspect is *intra vires* of the Dominion parliament, may, in another aspect, be *intra vires* also of the provincial legislatures,—these are among the great and fundamental doctrines of our Constitution which the Privy Council has established by a number of weighty judgments. And prominent among the names of those great jurists, whose work this has been, must always remain that of Lord Watson, of whom Lord Chancellor Haldane recently wrote:—' He filled in the skeleton which the Confederation Act had established, and in large measure shaped the growth

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[22] The following account of the origin of the right of appeal from colonial Courts to the Privy Council may be of interest:—'The Channel Islands which formed a part of the original possessions of the Conqueror, were unaffected by the growth of the English Courts of justice and the English parliament. There was an appeal from their own Court to the King of England, who had originally been Duke of Normandy, and the tribunal for hearing the appeals was eventually the King in Council, which still directly represented the Norman Duke and his Court

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or Council in one of its aspects. The Channel Islands being the King's possessions beyond the sea the analogy was applied to the King's posessions beyond the sea acquired at a later time; and an appeal lies, in the last resort, from the Courts of all the colonies and of India to the Sovereign in Council. Thus we see how the Imperial idea, of which so much has been heard of late, has been made to fit in with the traditions handed down from the time of William the Conqueror:' Pike's 'Public Records,' p. 22.

of the fibre which grew round it. He established the independence of the provinces and their Executives. He settled the burning controversies as to the Liquor Laws, and as to what Government, Dominion or provincial, had the title to gold and silver. His name will be long and gratefully remembered by Canadian statesmen.[23] ''

The third point which the study of our Constitution and its workings brings prominently before the mind, is of as much promise for the future, as of credit in the past. It is the practical common sense, and statesmanlike and patriotic moderation, and truly British spirit of compromise, with which any questions which have arisen between the federal authorities on the one hand, and the provincial authorities on the other have been dealt with. There has always been apparent a loyal desire to make the Constitution work; and because of this, and of its own intrinsic merits, the Constitution has worked, and worked well; and we have in Canada a federal system which nearly fifty years of experience has proved a success. In the issue for June 29th, 1913, of a popular Toronto newspaper, the leading Article opened with the words: ' The forty-fifth anniversary of Confederation finds the Dominion a happy and prosperous country, and the union between the provinces likely to remain perpetual."[24]

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[23] Article on Appellate Courts of the Empire, in (1900) 12 Jurid. Rev. at pp. 4-5. Professor Egerton well says that—' When the legal history of the Dominion is written, it will perhaps be found that Lord Watson played in the interpretation of the Canadian Constitution to some extent, the part played in the United States by Chief Justice Marshall:' History of Canada, 1763-1908, p. 243.

At the time of Confederation the doleful forebodings which had greeted the grant of self-government, that it could not be long before the colonies would sever the Imperial connection, were renewed. Sir John Macdonald, as events have proved, shewed a truer knowledge of human nature, and of his countrymen, when he said, in the Debates on the Quebec Resolutions[25]:—" One argument, but not a strong one, has been used against this Confederation, that it is an advance towards independence. Some are apprehensive that the very fact of our forming this union will hasten the time when we shall be severed from the mother country. I have no apprehension of that kind. I believe it will have the contrary effect. Does any one imagine that, when our population, instead of three and a half, will be seven millions, as it will be ere many years pass, we shall be one whit more willing than now to sever the connection with England? Would not those seven millions be just as anxious to maintain their allegiance to the Queen and their connection with the mother country, as we are now?" Well may we place alongside of these prophetic utterances, those of the present premier of the Dominion, in an Address delivered at Lindsay,[26] when, after referring to the forebodings as to the future of the Empire above alluded to, he said:—" When we look at the present relations of Canada with the mother country, how vain do all these prophecies appear? There has never been a time since the granting of responsible government to the colonies, or indeed before that time, when the attachment of the colonies to the mother country was warmer or closer than it is at the present time. That attachment may differ in its nature from that which was formerly felt, but it is none the less warm and none the less real. It is the attachment which Canada, as a great Dominion forming part of a great Empire, feels for the country which founded that Empire and which still controls its destinies. It is the attachment, not of a dependent and helpless child, but of a matured and emancipated child towards the parent which is now its ally, confidant, and adviser."

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[24] The Toronto World.

[25] Egerton and Grant's *op. cit.*, p. 392.

[26] This Address was published in "The Moccasin Prints," No. 2 (St. Lawrence Press, Montreal, 1912).

The British North America Act leaves it to the future to settle such modifications as circumstances may dictate in the form of the relations of this Dominion to the motherland and the Empire at large,—but it has provided for her a constitutional system under which Canadians possess all the freedom any people can desire to develop their own national life in their own way; and under which they may live free, contented, and prosperous 'while the British name lasts,'—and continue, after the manner of their ancestors, to fear God, love the brotherhood, and honour the King.

APPENDIX

OF

STATUTES AND ORDERS IN COUNCIL.

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ANNO TRICESIMO

VICTORIÆ REGINÆ.

CAP. III.

An Act for the Union of *Canada, Nova Scotia,* and *New Brunswick,* and the Government thereof; and for Purposes connected therewith.

[29th *March* 1867.]

WHEREAS the Provinces of *Canada, Nova Scotia,* and *New Brunswick* have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of *Great Britain* and *Ireland,* with a Constitution similar in Principle to that of the United Kingdom:[1]

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the *British* Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of *British North America:*

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[1] See *supra* p. 9, n. 5; 65-67; 82; 84. 88; 95-96; 239; 391; and Chap. XXX.

Be it therefore enacted and declared by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I.—PRELIMINARY.

Short Title.

1. This Act may be cited as The *British North America* Act, 1867.

Application of Provisions referring to the Queen.

2. The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of *Great Britain* and *Ireland.*

II.—UNION.

Declaration of Union.

3. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after a Day therein appointed, not being more than Six Months after the passing of this Act, the Provinces of *Cnaada, Nova Scotia* and *New Brunswick* shall form and be One Dominion under the Name of *Canada;* and on and after that Day those Three Provinces shall form and be One Dominion under that Name accordingly.

Construction of subsequent Provisions of Act.

4. The subsequent Provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union, that is to say, on and after the Day appointed for the Union taking effect in the Queen's Proclamation; and in the same Provisions, unless it is otherwise expressed or implied, the Name *Canada* shall be taken to mean *Canada* as constituted under this Act.

Four Provinces.

5. *Canada* shall be divided into Four Provinces, named *Ontario, Quebec, Nova Scotia,* and *New Brunswick.*

Provinces of Ontario and Quebec.

6. The Parts of the Province of *Canada* (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of *Upper Canada* and *Lower Canada* shall be deemed to be severed, and shall form Two Separate Provinces. The Part which formerly constituted the Province of *Upper Canada* shall constitute the Province of *Ontario;* and the Part which formerly constituted the Province of *Lower Canada* shall constitute the Province of Quebec.

Provinces of Nova Scotia and New Brunswick.

7. The Provinces of *Nova Scotia* and *New Brunswick* shall have the same Limits as at the passing of this Act.

Decennial Census.

8. In the general Census of the Population of *Canada* which is hereby required to be taken in the Year One thousand eight hundred and seventy-one, and in every Tenth Year thereafter, the respective Populations of the Four Provinces shall be distinguished.

III.—EXECUTIVE POWER.

Declaration of Executive Power in the Queen.

9. The Executive Government and Authority of and over *Canada* is hereby declared to continue and be vested in the Queen.[2]

Application of Provisions referring to Governor-General.

10. The Provisions of this Act referring to the Governor General extend and apply to the Governor General for the Time being of *Canada,* or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of *Canada* on behalf and in the Name of the Queen, by whatever Title he is designated.

Constitution of Privy Council for Canada.

11. There shall be a Council to aid and advise in the Government of *Canada,* to be styled the Queen's Privy Council for *Canada;* and the Persons who are to be Members of that Council shall be from Time to Time chosen and summoned by the Governor General and sworn in as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor General.

All Powers under Acts to be exercised by

12. All Powers, Authorities, and Functions which under any Act of the Parliament of *Great Britain,* or of the Parliament of the United Kingdom of *Great Britain* and *Ire-*

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[2] See *supra* pp. 27-29.

Governor General with Advice of Privy Council, or alone.

land, or of the Legislature of *Upper Canada, Lower Canada, Canada, Nova Scotia,* or *New Brunswick,* are at the Union vested in or exerciseable by the respective Governors or Lieutenant Governors of those Provinces, with the Advice, or with the Advice and Consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of *Canada,* be vested in and exerciseable by the Governor General, with the Advice or with the Advice and Consent of or in conjunction with the Queen's Privy Council for *Canada,* or any Members thereof, or by the Governor General individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of *Great Britain* or of the Parliament of the United Kingdom of *Great Britain* and *Ireland*) to be abolished or altered by the Parliament of *Canada.*[3]

Application of Provisions referring to Governor General in Council.

13. The Provisions of this Act referring to the Governor General in Council shall be construed as referring to the Governor General acting by and with the Advice of the Queen's Privy Council for *Canada.*

Power to Her Majesty to authorize Governor General to appoint Deputies.

14. It shall be lawful for the Queen, if Her Majesty thinks fit, to authorize the Governor General from Time to Time to appoint any Person or any Persons jointly or severally to be his Deputy or Deputies within any Part or Parts of *Canada,* and in that Capacity to exercise during the Pleasure of the Governor General such of the Powers, Authorities, and Functions of the Governor General as the Governor General deems it necessary or expedient to assign to him or them, subject to any Limitations or Directions expressed or given by the Queen; but the Appointment of such a Deputy or Deputies shall not affect the Exercise by the Governor General himself of any Power, Authority, or Function.

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[3] See *supra* p. 733.

Command of armed Forces to continue to be vested in the Queen.

15. The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in *Canada*, is hereby declared to continue and be vested in the Queen.

Seat of Government of Canada.

16. Until the Queen otherwise directs, the Seat of Government of *Canada* shall be *Ottawa*.

IV.—LEGISLATIVE POWER.

Constitution of Parliament of Canada.

17. There shall be One Parliament for *Canada*, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

Privileges, &c. of Houses.

18. The Privileges, Immunities, and Powers to be held, enjoyed, and exercised by the Senate and by the House of Commons and by the Members thereof respectively shall be such as are from Time to Time defined by Act of the Parliament of *Canada*, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of *Great Britain* and *Ireland* and by the Members thereof.[4]

First Session of the Parliament of Canada.

19. The Parliament of *Canada* shall be called together not later than Six Months after the Union.

Yearly Session of the Parliament of Canada.

20. There shall be a Session of the Parliament of *Canada* once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Parliament in one Session and its first Sitting in the next Session.

The Senate.

Number of Senators.

21. The Senate shall, subject to the Provisions of this Act, consist of Seventy-two Members, who shall be styled Senators.[5]

Representation of Provinces in Senate.

22. In relation to the Constitution of the Senate *Canada* shall be deemed to consist of Three Divisions:

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[4] See *supra* pp. 158-159.

[5] See *supra* p. 3, n. 2.

1. *Ontario;*

2. *Quebec;*

3. The Maritime Provinces, *Nova Scotia* and *New Brunswick;*

which Three Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as follows: *Ontario* by Twenty-four Senators; *Quebec* by Twenty-four Senators; and the Maritime Provinces by Twenty-four Senators, Twelve thereof representing *Nova Scotia,* and Twelve thereof representing *New Brunswick.*

In the Case of *Quebec* each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions of *Lower Canada* specified in Schedule A. to Chapter One of the Consolidated Statutes of *Canada.*

Qualifications of Senator.

23. The Qualifications of a Senator shall be as follows:[6]

(1.) He shall be of the full Age of Thirty Years:

(2.) He shall be either a natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of *Great Britain,* or of the Parliament of the United Kingdom of *Great Britain* and *Ireland,* or of the Legislature of One of the Provinces of *Upper Canada, Lower Canada, Canada, Nova Scotia,* or *New Brunswick,* before the Union, or of the Parliament of *Canada* after the Union:

(3.) He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in Free and Common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Francalleu or in Roture, within the Province for which he is appointed, of the Value of Four thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same:

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[6] See *supra* p. 3, n. 2.

(4.) His Real and Personal Property shall be together worth Four thousand Dollars over and above his Debts and Liabilities:

(5.) He shall be resident in the Province for which he is appointed:

(6.) In the Case of *Quebec* he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.

24. The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of *Canada,* summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator. **Summons of Senator.**

25. Such Persons shall be first summoned to the Senate as the Queen by Warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their Names shall be inserted in the Queen's Proclamation of Union. **Summons of First Body of Senators.**

26. If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Three or Six Members be added to the Senate, the Governor General may by Summons to Three or Six qualified Persons (as the Case may be), representing equally the Three Divisions of *Canada,* add to the Senate accordingly. **Addition of Senators in certain Cases.**

27. In case of such Addition being at any Time made, the Governor General shall not summon any Person to the Senate, except on a further like Direction by the Queen on the like Recommendation, until each of the Three Divisions of *Canada* is represented by Twenty-four Senators and no more. **Reduction of Senate to normal Number.**

28. The Number of Senators shall not at any Time exceed Seventy-eight. **Maximum Number of Senators.**

29. A Senator shall, subject to the Provisions of this Act, hold his Place in the Senate for Life. **Tenure of Place in Senate.**

Resignation of Place in Senate.

30. A Senator may by Writing under his Hand addressed to the Governor General resign his Place in the Senate, and thereupon the same shall be vacant.

Disqualification of Senators.

31. The Place of a Senator shall become vacant in any of the following Cases:

(1.) If for Two consecutive Sessions of the Parliament he fails to give his Attendance in the Senate:

(2.) If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience, or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power:

(3.) If he is adjudged Bankrupt or Insolvent, or applies for the Benefit of any Law relating to Insolvent Debtors, or becomes a public Defaulter:

(4.) If he is attainted of Treason or convicted of Felony or of any infamous Crime:

(5.) If he ceases to be qualified in respect of Property or of Residence; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of *Canada* while holding an Office under that Government requiring his Presence there.

Summons on Vacancy in Senate.

32. When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy.

Questions as to Qualifications and Vacancies in Senate.

33. If any Question arises respecting the Qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate.

Appointment of Speaker of Senate.

34. The Governor General may from Time to Time, by Instrument under the Great Seal of *Canada*, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his Stead.

Quorum of Senate.

35. Until the Parliament of *Canada* otherwise provides, the Presence of at least Fifteen Senators, including the

Speaker, shall be necessary to constitute a Meeting of the Senate for the Exercise of its Powers.

36. Questions arising in the Senate shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative.

Voting in Senate.

The House of Commons.

37. The House of Commons shall, subject to the Provisions of this Act, consist of One hundred and eighty-one Members, of whom Eighty-two shall be elected for *Ontario,* Sixty-five for *Quebec,* Nineteen for *Nova Scotia,* and Fifteen for *New Brunswick.*

Constitution of House of Commons in Canada.

38. The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of *Canada,* summon and call together the House of Commons.

Summoning of House of Commons.

39. A Senator shall not be capable of being elected or of sitting or voting as a Member of the House of Commons.

Senators not to sit in House of Commons.

40. Until the Parliament of *Canada* otherwise provides, *Ontario, Quebec, Nova Scotia,* and *New Brunswick* shall, for the Purposes of the Election of Members to serve in the House of Commons, be divided into Electoral Districts as follows:

Electoral Districts of the Four Provinces.

1.—*Ontario.*

Ontario shall be divided into the Counties, Ridings of Counties, Cities, Parts of Cities, and Towns enumerated in the First Schedule to this Act, each whereof shall be an Electoral District, each such District as numbered in that Schedule being entitled to return One Member.

2.—*Quebec.*

Quebec shall be divided into Sixty-five Electoral Districts, composed of the Sixty-five Electoral Divisions into which *Lower Canada* is at the passing of this Act divided under Chapter Two of the Consolidated Statutes of *Canada,* Chapter Seventy-five of the Consolidated Statutes for *Lower Canada,* and the Act of the Province of *Canada* of the Twenty-third Year of the Queen, Chapter One, or any other Act amending the same in force at the Union, so that each such Electoral Division shall be for the Purposes of this Act an Electoral District entitled to return One Member.

3.—*Nova Scotia.*

Each of the Eighteen Counties of *Nova Scotia* shall be an Electoral District. The County of *Halifax* shall be entitled to return Two Members, and each of the other Counties One Member.

4.—*New Brunswick.*

Each of the Fourteen Counties into which *New Brunswick* is divided, including the City and County of *St. John,* shall be an Electoral District. The City of *St. John* shall also be a separate Electoral District. Each of these Fifteen Electoral Districts shall be entitled to return One Member.

Continuance of existing Election Laws until Parliament of Canada otherwise provides.

41. Until the Parliament of *Canada* otherwise provides, all Laws in force in the several Provinces at the Union relative to the following Matters or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at Elections of such Members, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which Elections may be continued, the Trial of controverted Elections, and Proceedings incident thereto, the vacating of Seats of Members, and the Execution of new Writs in case of Seats vacated otherwise than by Dissolution,—shall respectively apply to Elections of Members to serve in the House of Commons for the same several Provinces.

Provided that, until the Parliament of *Canada* otherwise provides, at any Election for a Member of the House of Commons for the District of *Algoma,* in addition to Persons qualified by the Law of the Province of *Canada* to vote, every Male *British* Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote.

42. For the First Election of Members to serve in the House of Commons the Governor General shall cause Writs to be issued by such Person, in such Form, and addressed to such Returning Officers as he thinks fit.

Writs for First Election.

The Person issuing Writs under this Section shall have the like Powers as are possessed at the Union by the Officers charged with the issuing of Writs for the Election of Members to serve in the respective House of Assembly or Legislative Assembly of the Province of *Canada, Nova Scotia,* or *New Brunswick;* and the Returning Officers to whom Writs are directed under this Section shall have the like Powers as are possessed at the Union by the Officers charged with the returning of Writs for the Election of Members to serve in the same respective House of Assembly or Legislative Assembly.

43. In case a Vacancy in the Representation in the House of Commons of any Electoral District happens before the Meeting of the Parliament, or after the Meeting of the Parliament before Provision is made by the Parliament in this Behalf, the Provisions of the last foregoing Section of this Act shall extend and apply to the issuing and returning of a Writ in respect of such vacant District.

As to Casual Vacancies.

44. The House of Commons on its first assembling after a General Election shall proceed with all practicable Speed to elect One of its Members to be Speaker.

As to Election of Speaker of House of Commons.

45. In case of a Vacancy happening in the Office of Speaker by Death, Resignation, or otherwise, the House of Commons shall with all practicable Speed proceed to elect another of its Members to be Speaker.

As to filling up Vacancy in Office of Speaker.

46. The Speaker shall preside at all Meetings of the House of Commons.

Speaker to preside.

47. Until the Parliament of *Canada* otherwise provides, in case of the Absence for any Reason of the Speaker from the Chair of the House of Commons for a Period of Forty-eight consecutive Hours, the House may elect another of its Members to act as Speaker, and the Member so elected shall

Provision in case of Absence of Speaker.

during the Continuance of such Absence of the Speaker have and execute all the Powers, Privileges, and Duties of Speaker.

Quorum of House of Commons.

48. The Presence of at least Twenty Members of the House of Commons shall be necessary to constitute a Meeting of the House for the Exercise of its Powers, and for that Purpose the Speaker shall be reckoned as a Member.

Voting in House of Commons.

49. Questions arising in the House of Commons shall be decided by a Majority of Voices other than that of the Speaker, and when the Voices are equal, but not otherwise, the Speaker shall have a Vote.

Duration of House of Commons.

50. Every House of Commons shall continue for Five Years from the Day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor General), and no longer.

Decennial Re-adjustment of Representation.

51. On the Completion of the Census in the Year One thousand eight hundred and seventy-one, and of each subsequent decennial Census, the Representation of the Four Provinces[7] shall be readjusted by such Authority, in such Manner, and from such Time, as the Parliament of *Canada* from Time to Time provides, subject and according to the following Rules:

(1.) *Quebec* shall have the fixed Number of Sixty-five Members:

(2.) There shall be assigned to each of the other Provinces such a Number of Members as will bear the same Proportion to the Number of its Population (ascertained at such Census) as the Number Sixty-five bears to the Number of the Population of *Quebec* (so ascertained):

(3.) In the Computation of the Number of Members for a Province a fractional Part not exceeding One Half of the whole Number requisite for entitling the Province to a Member shall be disregarded; but a fractional Part exceeding One Half of that Number shall be equivalent to the whole Number:

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[7] See *supra* p. 5, n. 3.

(4.) On any such Re-adjustment the Number of Members for a Province shall not be reduced unless the Proportion which the Number of the Population of the Province bore to the Number of the aggregate Population of *Canada*[8] at the then last preceding Re-adjustment of the Number of Members for the Province is ascertained at the then latest Census to be diminished by One Twentieth Part or upwards:

(5.) Such Re-adjustment shall not take effect until the Termination of the then existing Parliament.

52. The Number of Members of the House of Commons may be from Time to Time increased by the Parliament of *Canada*, provided the proportionate Representation of the Provinces prescribed by this Act is not thereby disturbed.

Increase of Number of House of Commons.

Money Votes; Royal Assent.

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Appropriation and Tax Bills.

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

Recommendation of Money Votes.

55. Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure.

Royal Assent to Bills, &c.

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[8] See *Attorneys-General of Prince Edward Island and New Brunswick* v. *Attorney-General of Canada,* [1905] A. C. 37; 33 S. C. R. 475.

Disallowance by Order in Council of Act assented to by Governor General.

56. Where the Governor General assents to a Bill in the Queen's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to One of Her Majesty's Principal Secretaries of State, and if the Queen in Council within Two Years after Receipt thereof by the Secretary of State thinks fit to disallow the Act, such Disallowance (with a Certificate of the Secretary of State of the Day on which the Act was received by him) being signified by the Governor General, by Speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the Day of such Signification.[9]

Signification of Queen's Pleasure on Bill reserved.

57. A Bill reserved for the Signification of the Queen's Pleasure shall not have any Force unless and until, within Two Years from the Day on which it was presented to the Governor General for the Queen's Assent, the Governor General signifies, by Speech or Message to each of the Houses of Parliament or by Proclamation, that it has received the Assent of the Queen in Council.

An Entry of every such Speech, Message, or Proclamation shall be made in the Journal of each House, and a Duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of *Canada*.

V.—PROVINCIAL CONSTITUTIONS.

Executive Power.

Appointment of Lieutenant Governors of Provinces.

58. For each Province there shall be an Officer, styled the Lieutenant Governor, appointed by the Governor General in Council by Instrument under the Great Seal of *Canada*.[10]

Tenure of Office of Lieutenant Governor.

59. A Lieutenant Governor shall hold Office during the Pleasure of the Governor General;[11] but any Lieutenant Governor appointed after the Commencement of the First Session of the Parliament of *Canada* shall not be removeable within Five Years from his Appointment, except for Cause assigned, which shall be communicated to him in Writing within One Month after the Order for his Removal is made, and shall be communicated by Message to the Senate and to the House of Commons within One Week thereafter if the Parliament is then sitting, and if not then within One Week after the Commencement of the next Session of the Parliament.

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[9] See *supra* pp. 34-51.
[10] See *supra* p. 7, n. 4.
[11] See *supra* p. 7, n. 4.

60. The Salaries of the Lieutenant Governors shall be fixed and provided by the Parliament of *Canada*. **Salaries of Lieutenant Governors.**

61. Every Lieutenant Governor shall, before assuming the Duties of his Office, make and subscribe before the Governor General or other Person authorized by him Oaths of Allegiance and Office similar to those taken by the Governor General. **Oaths, &c. of Lieutenant Governor.**

62. The Provisions of this Act referring to the Lieutenant Governor extend and apply to the Lieutenant Governor for the Time being of each Province, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of the Province, by whatever Title he is designated. **Application of Provisions referring to Lieutenant Governor.**

63. The Executive Council of *Ontario* and of *Quebec* shall be composed of such Persons as the Lieutenant Governor from Time to Time thinks fit, and in the first instance of the following Officers, namely,—the Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, with in *Quebec* the Speaker of the Legislative Council and the Solicitor General. **Appointment of Executive Officers for Ontario and Quebec.**

64. The Constitution of the Executive Authority in each of the Provinces of *Nova Scotia* and *New Brunswick* shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act. **Executive Government of Nova Scotia and New Brunswick.**

65. All Powers, Authorities, and Functions which under any Act of the Parliament of *Great Britain*, or of the Parliament of the United Kingdom of *Great Britain* and *Ireland*, **Powers of be exercised by Lieutenant Go-**

vernor of Ontario or Quebec with Advice, or alone.

or of the Legislature of *Upper Canada, Lower Canada,* or *Canada,* were or are before or at the Union vested in or exerciseable by the respective Governors or Lieutenant Governors of those Provinces, with the Advice or with the Advice and Consent of the respective Executive Councils thereof, or in conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same are capable of being exercised after the Union in relation to the Government of *Ontario* and *Quebec* respectively, be vested in and shall or may be exercised by the Lieutenant Governors of *Ontario* and *Quebec* respectively, with the Advice or with the Advice and Consent of or in conjunction with the respective Executive Councils, or any Members thereof, or by the Lieutenant Governor individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of *Great Britain,* or of the Parliament of the United Kingdom of *Great Britain* and *Ireland,*) to be abolished or altered by the respective Legislatures of *Ontario* and *Quebec.*

Application of Provisions referring to Lieutenant Governor in Council.

66. The Provisions of this Act referring to the Lieutenant Governor in Council shall be construed as referring to the Lieutenant Governor of the Province acting by and with the Advice of the Executive Council thereof.

Administration in Absence, &c. of Lieutenant Governor.

67. The Governor General in Council may from Time to Time appoint an Administrator to execute the Office and Functions of Lieutenant Governor during his Absence, Illness, or other Inability.

Seats of Provincial Governments.

68. Unless and until the Executive Government of any Province otherwise directs with respect to that Province, the Seats of Government of the Provinces shall be as follows, namely,—of *Ontario,* the City of *Toronto;* of *Quebec,* the City of *Quebec;* of *Nova Scotia,* the City of *Halifax;* and of *New Brunswick,* the City of *Fredericton.*

Legislative Power.

1.—*Ontario.*

Legislature for Ontario.

69. There shall be a Legislature for *Ontario* consisting of the Lieutenant Governor and of One House, styled the Legislative Assembly of *Ontario.*

70. The Legislative Assembly of *Ontario* shall be composed of Eighty-two Members, to be elected to represent the Eighty-two Electoral Districts set forth in the First Schedule to this Act.

Electoral Districts.

2.—*Quebec.*

71. There shall be a Legislature for *Quebec* consisting of the Lieutenant Governor and of Two Houses, styled the Legislative Council of *Quebec* and the Legislative Assembly of *Quebec.*

Legislature for Quebec.

72. The Legislative Council of *Quebec* shall be composed of Twenty-four Members, to be appointed by the Lieutenant Governor, in the Queen's Name, by Instrument under the Great Seal of *Quebec,* one being appointed to represent each of the Twenty-four Electoral Divisions of *Lower Canada* in this Act referred to, and each holding Office for the Term of his Life, unless the Legislature of *Quebec* otherwise provides under the Provisions of this Act.

Constitution of Legislative Council.

73. The Qualifications of the Legislative Councillors of *Quebec* shall be the same as those of the Senators for *Quebec.*

Qualification of Legislative Councillors.

74. The Place of a Legislative Councillor of *Quebec* shall become vacant in the Cases, *mutatis mutandis,* in which the Place of Senator becomes vacant.

Resignation, Disqualification, &c.

75. When a Vacancy happens in the Legislative Council of *Quebec* by Resignation, Death, or otherwise, the Lieutenant Governor, in the Queen's Name, by Instrument under the Great Seal of *Quebec,* shall appoint a fit and qualified Person to fill the Vacancy.

Vacancies.

76. If any Question arises respecting the Qualification of a Legislative Councillor of *Quebec,* or a Vacancy in the Legislative Council of *Quebec,* the same shall be heard and determined by the Legislative Council.

Questions as to Vacancies, &c.

77. The Lieutenant Governor may from Time to Time, by Instrument under the Great Seal of *Quebec,* appoint a Member of the Legislative Council of *Quebec* to be Speaker thereof, and may remove him and appoint another in his Stead.

Speaker of Legislative Council.

Quorum of Legislative Council.

78. Until the Legislature of *Quebec* otherwise provides, the Presence of at least Ten Members of the Legislative Council, including the Speaker, shall be necessary to constitute a Meeting for the Exercise of its Powers.

Voting in Legislative Council.

79. Questions arising in the Legislative Council of *Quebec* shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative.

Constitution of Legislative Assembly of Quebec.

80. The Legislative Assembly of *Quebec* shall be composed of Sixty-five Members, to be elected to represent the Sixty-five Electoral Divisions or Districts of *Lower Canada* in this Act referred to, subject to Alteration thereof by the Legislature of *Quebec;* Provided that it shall not be lawful to present to the Lieutenant Governor of *Quebec* for Assent any Bill for altering the Limits of any of the Electoral Divisions or Districts mentioned in the Second Schedule to this Act, unless the Second and Third Readings of such Bill have been passed in the Legislative Assembly with the Concurrence of the Majority of the Members representing all those Electoral Divisions or Districts, and the Assent shall not be given to such Bill unless an Address has been presented by the Legislative Assembly to the Lieutenant Governor stating that it has been so passed.

3.—*Ontario and Quebec.*

First Session of Legislatures.

81. The Legislatures of *Ontario* and *Quebec* respectively shall be called together not later than Six Months after the Union.

Summoning of Legislative Assemblies.

82. The Lieutenant Governor of *Ontario* and of *Quebec* shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of the Province, summon and call together the Legislative Assembly of the Province.

Restriction on Election of Holders of Offices.

83. Until the Legislature of *Ontario* or of *Quebec* otherwise provides, a Person accepting or holding in *Ontario* or in *Quebec* any Office, Commission, or Employment, permanent or temporary, at the Nomination of the Lieutenant Governor, to which an annual Salary, or any Fee, Allowance, Emolument, or Profit of any Kind or Amount whatever from the Province is attached, shall not be eligible as a Member of the Legislative Assembly of the respective Province, nor shall he sit or vote as such; but nothing in this Section shall make ineligible any Person being a Member of the Executive Council of the respective Province, or holding any of the following Offices, that is to say, the Offices of Attorney General, Secretary and Registrar of the Province, Treasurer of the Province, Commissioner of Crown Lands, and Commissioner of Agriculture and Public Works, and in *Quebec* Solicitor General, or shall disqualify him to sit or vote in the House for which he is elected, provided he is elected while holding such Office.[12]

Continuance of existing Election Laws.

84. Until the Legislatures of *Ontario* and *Quebec* respectively otherwise provide, all Laws which at the Union are in force in those Provinces respectively, relative to the following Matters, or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the Assembly of *Canada,* the Qualifications or Disqualifications of Voters, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which such Elections may be continued, and the Trial of controverted Elections and the Proceedings incident thereto, the vacating of the Seats of Members and the issuing and execution of new Writs in case of Seats vacated otherwise than by Dissolution,—shall respectively apply to Elections of Members to serve in the respective Legislative Assemblies of *Ontario* and *Quebec.*

Provided that, until the Legislature of *Ontario* otherwise provides, at any Election for a Member of the Legislative Assembly of *Ontario* for the District of *Algoma,* in addition to Persons qualified by the Law of the Province of *Canada* to vote, every Male *British* Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote.

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[12] See *supra* p. 9, n. 5.

Duration of Legislative Assemblies.

85. Every Legislative Assembly of *Ontario* and every Legislative Assembly of *Quebec* shall continue for Four Years from the Day of the Return of the Writs for choosing the same (subject nevertheless to either the Legislative Assembly of *Ontario* or the Legislative Assembly of *Quebec* being sooner dissolved by the Lieutenant Governor of the Province), and no longer.

Yearly Session of Legislature.

86. There shall be a Session of the Legislature of *Ontario* and of that of *Quebec* once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Legislature in each Province in one Session and its first Sitting in the next Session.

Speaker, Quorum, &c.

87. The following Provisions of this Act respecting the House of Commons of *Canada* shall extend and apply to the Legislative Assemblies of *Ontario* and *Quebec,* that is to say,—the Provisions relating to the Election of a Speaker originally and on Vacancies, the Duties of the Speaker, the Absence of the Speaker, the Quorum, and the Mode of voting, as if those Provisions were here re-enacted and made applicable in Terms to each such Legislative Assembly.

4.—*Nova Scotia and New Brunswick.*

Constitutions of Legislatures of Nova Scotia and New Brunswick.

88. The Constitution of the Legislature of each of the Provinces of *Nova Scotia* and *New Brunswick* shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act;[13] and the House of Assembly of *New Brunswick* existing at the passing of this Act shall, unless sooner dissolved, continue for the Period for which it was elected.

5.—*Ontario, Quebec, and Nova Scotia.*

First Elections.

89. Each of the Lieutenant Governors of *Ontario, Quebec,* and *Nova Scotia* shall cause Writs to be issued for the First Election of Members of the Legislative Assembly thereof in such Form and by such Person as he thinks fit, and at such

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[13] See *supra* p. 10, n. 6.

Time and addressed to such Returning Officer as the Governor General directs, and so that the First Election of Member of Assembly for any Electoral District or any Subdivision thereof shall be held at the same Time and at the same Places as the Election for a Member to serve in the House of Commons of *Canada* for that Electoral District.

6.—*The Four Provinces.*

Application to Legislatures of Provisions respecting Money Votes, &c.

90. The following Provisions of this Act respecting the Parliament of *Canada,* namely,—the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes,[14] the Assent to Bills, the Disallowance of Acts,[15] and the Signification of Pleasure on Bills reserved,—shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province of *Canada.*[16]

VI.—DISTRIBUTION OF LEGISLATIVE POWERS.

Powers of the Parliament.

Legislative Authority of Parliament of Canada.

91.[17] It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of *Canada,* in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces;[18] and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of *Canada* extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

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[14] See *supra* p. 11, n. 7.
[15] See *supra* p. 31.
[16] See *supra* pp. 30-44.
[17] See as to this section generally *supra* pp. 112-120; 133.
[18] See *supra* pp. 93; 99-100.

1. The Public Debt and Property.[19]
2. The Regulation of Trade and Commerce.[20]
3. The raising of Money by any Mode or System of Taxation.[21]
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics,[22]
7. Militia, Military and Naval Service and Defence.[23]
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of *Canada.*
9. Beacons, Buoys, Lighthouses, and *Sable Island.*
10. Navigation and Shipping.[24]
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.[25]
12. Sea Coast and Inland Fisheries.[26]
13. Ferries between a Province and any *British* or Foreign Country or between Two Provinces.[27]
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.[28]
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.[29]
19. Interest.[30]
20. Legal Tender.
21. Bankruptcy and Insolvency.[31]
22. Patents of Invention and Discovery.[32]
23. Copyrights.[33]

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[19] See *supra* p. 230.
[20] See *supra* pp. 230-236.
[21] See *supra* pp. 237-239.
[22] See *supra* p. 239, n.
[23] See *supra* pp. 239-241.
[24] See *supra* pp. 241-246.
[25] See *supra* p. 247.
[26] See *supra* pp. 247-263.
[27] See *supra* pp. 263-264.
[28] See *supra* pp. 264-272.
[29] See *supra* pp. 273-274.
[30] See *supra* pp. 274-279.
[31] See *supra* 279-293.
[32] See *supra* pp. 293-294.
[33] See *supra* pp. 295-296.

24. *Indians,* and Lands reserved for the *Indians.*[34]
25. Naturalization and Aliens.[35]
26. Marriage and Divorce.[36]
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.[37]
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.[38]

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.[39]

Exclusive Powers of Provincial Legislatures.

Subjects of exclusive Provincial Legislation.

92.[40] In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.[41]
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.[42]
3. The borrowing of Money on the sole Credit of the Province.

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[34] See *supra* pp. 296-303.
[35] See *supra* pp. 303-314.
[36] See *supra* pp. 314-319.
[37] See *supra* pp. 319-337.
[38] See *supra* pp. 337-383.
[39] See *supra* pp. 138-140; 168-169.
[40] See as to this section generally pp. 112-120.
[41] See *supra* pp. 384-388.
[42] See *supra* pp. 388-424.

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.[43]
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.[44]
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.[45]
9. Shop, Saloon, Tavern, Auctioneer, and other Licenses in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.[46]
10. Local Works and Undertakings other than such as are of the following Classes.[47]
    - *a.* Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
    - *b.* Lines of Steam Ships between the Province and any *British* or Foreign Country:
    - *c.* Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of *Canada* to be for the general Advantage of *Canada* or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.[48]
12. The Solemnization of Marriage in the Province.[49]

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[43] See *supra* pp. 24; 424.
[44] See *supra* pp. 425-426.
[45] See *supra* pp. 426-433.
[46] See *supra* 433-445.
[47] See *supra* pp. 445-461.
[48] See *supra* pp. 461-488.
[49] See *supra* p. 488.

13. Property and Civil Rights in the Province.[50]
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.[51]
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.[52]
16. Generally all Matters of a merely local or private Nature in the Province.[53]

Education.

Legislation respecting Education.

93.[54] In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—

(1.) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2.) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in *Upper Canada* on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in *Quebec*:

(3.) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

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[50] See *supra* pp. 488-525.
[51] See *supra* pp. 525-573.
[52] See *supra* pp. 574-627.
[53] See *supra* pp. 140-143; 627-629.
[54] See as to this section, *supra* pp. 630-666.

(4.) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of *Canada* may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

Uniformity of Laws in Ontario, Nova Scotia, and New Brunswick.

Legislation for Uniformity of Laws in Three Provinces.

94. Notwithstanding anything in this Act, the Parliament of *Canada* may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in *Ontario, Nova Scotia,* and *New Brunswick,* and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of *Canada* to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of *Canada* making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.[55]

Agriculture and Immigration.

Concurrent Powers of Legislation respecting Agriculture, &c.

95. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of *Canada* may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.[56]

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[55] See *supra* pp. 499-500; 521-525.

VII.—JUDICATURE.

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in *Nova Scotia* and *New Brunswick*.[57] **Appointment of Judges.**

97. Until the Laws relative to Property and Civil Rights in *Ontario, Nova Scotia,* and *New Brunswick,* and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces. **Selection of Judges in Ontario, &c.**

98. The Judges of the Courts of *Quebec* shall be selected from the Bar of that Province. **Selection of Judges in Quebec.**

99. The Judges of the Superior Courts shall hold Office during good Behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons. **Tenure of Office of Judges of Superior Courts.**

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in *Nova Scotia* and *New Brunswick*), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of *Canada*. **Salaries, &c. of Judges.**

101. The Parliament of *Canada* may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court **General Court of Appeal, &c.**

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[56] See *supra* p. 201, n.
[57] See *supra* pp. 526-540.

of Appeal for *Canada,* and for the Establishment of any additional Courts for the better Administration of the Laws of *Canada.*[58]

VIII.—Revenues; Debts; Assets; Taxation.

Creation of Consolidated Revenue Fund.

102. All Duties and Revenues over which the respective Legislatures of *Canada, Nova Scotia,* and *New Brunswick* before and at the Union had and have Power of Appropriation, except such Portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of *Canada* in the Manner and subject to the Charges in this Act provided.[59]

Expenses of Collection, &c.

103. The Consolidated Revenue Fund of *Canada* shall be permanently charged with the Costs, Charges, and Expenses incident to the Collection, Management, and Receipt thereof, and the same shall form the First Charge thereon, subject to be reviewed and audited in such Manner as shall be ordered by the Governor General in Council until the Parliament otherwise provides.

Interest of Provincial Public Debts.

104. The annual Interest of the Public Debts of the several Provinces of *Canada, Nova Scotia,* and *New Brunswick* at the Union shall form the Second Charge on the Consolidated Revenue Fund of *Canada.*

Salary of Governor General.

105. Unless altered by the Parliament of *Canada,* the Salary of the Governor General shall be Ten thousand Pounds Sterling Money of the United Kingdom of *Great Britain* and *Ireland,* payable out of the Consolidated Revenue Fund of *Canada,* and the same shall form the Third Charge thereon.

Appropriation from Time to Time.

106. Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of *Canada,* the same shall be appropriated by the Parliament of *Canada* for the Public Service.

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[58] See *supra* p. 12, n. 8; 246; 274; 331, n.; 672-688.

[59] See *supra* pp. 489, n.; 725.

Transfer of Stocks, &c.

107. All Stocks, Cash, Banker's Balances, and Securities for Money belonging to each Province at the Time of the Union, except as in this Act mentioned, shall be the Property of *Canada,* and shall be taken in Reduction of the Amount of the respective Debts of the Provinces at the Union.

Transfer of Property in Schedule.

108. The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of *Canada.*

Property in Lands, Mines, &c.

109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of *Canada, Nova Scotia,* and *New Brunswick* at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties,[60] shall belong to the several Provinces of *Ontario, Quebec, Nova Scotia* and *New Brunswick* in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.[61]

Assets connected with Provincial Debts.

110. All Assets connected with such Portions of the Public Debt of each Province as are assumed by that Province shall belong to that Province.

Canada to be liable to Provincial Debts.

111. *Canada* shall be liable for the Debts and Liabilities of each Province existing at the Union.[61a]

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[60] See, as to ferries, *supra* pp. 263-4; 733.

[61] See *supra* pp. 263; 297; 708-739.

[61a] Upon the argument in *Attorney-General for Canada* v. *Attorney-General for Ontario,* [1897] A. C. 199, (M.S. transcript from shorthand notes, 1st day, pp. 84—5,) Lord Watson is reported as saying::—"The policy of these sections of the Act, 109 and 112, and 111, and 142 when read together appears to me to be generally this beyond all dispute. The intention obviously was to provide that with regard to all those debts and liabilities of the old province of Canada, which were simply debts and liabilities charged generally upon the revenues of the provinces, the creditors were to be paid by the Dominion, and to a certain extent, in excess of a particular sum, the Dominion was to be recouped by the two new provinces in the proportions which might be determined under the provisions of section 142. On the other hand to this extent it is made plain—at least I hold it to be made very plain under section 109—that any debt or liability which was made a proper charge upon any property or assets passing to the province under section 109, was to remain that charge, and was not to be satisfied by the Dominion Government under section 111." The case was an appeal from the award of certain arbitrators appointed for the final determination of questions which had arisen on the settlement of accounts between the Dominion of Canada and the provinces of Ontario and Quebec, on the basis of the above provisions of this Act, relating to the incidence, after the Union, of the debts and liabilities of the old province of Canada. See also, *supra* pp. 734-736.

Debts of Ontario and Quebec.

112. *Ontario* and *Quebec* conjointly shall be liable to *Canada* for the Amount (if any) by which the Debt of the Province of *Canada* exceeds at the Union Sixty-two million five hundred thousand Dollars, and shall be charged with Interest at the Rate of Five *per Centum per Annum* thereon.[62]

Assets of Ontario and Quebec

113. The Assets enumerated in the Fourth Schedule to this Act belonging at the Union to the Province of *Canada* shall be the Property of *Ontario* and *Quebec* conjointly.

Debt of Nova Scotia.

114. *Nova Scotia* shall be liable to *Canada* for the Amount (if any) by which its Public Debt exceeds at the Union Eight million Dollars, and shall be charged with Interest at the Rate of Five *per Centum per Annum* thereon.

Debt of New Brunswick.

115. *New Brunswick* shall be liable to *Canada* for the Amount (if any) by which its Public Debt exceeds at the Union Seven million Dollars, and shall be charged with Interest at the Rate of Five *per Centum per Annum* thereon.

Payment of Interest to Nova Scotia and New Brunswick.

116. In case the Public Debts of *Nova Scotia* and *New Brunswick* do not at the Union amount to Eight million and Seven million Dollars respectively, they shall respectively receive by half-yearly Payments in advance from the Government of *Canada* Interest at Five *per Centum per Annum* on the Difference between the actual Amounts of their respective Debts and such stipulated Amounts.

Provincial Public Property.

117. The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of *Canada* to assume any Lands or Public Property required for Fortifications or for the Defence of the Country.[63]

Grants to Provinces.

118. The following Sums shall be paid yearly by *Canada* to the several Provinces for the Support of their Governments and Legislatures:

	Dollars.
Ontario	Eighty thousand.
Quebec	Seventy thousand.
Nova Scotia	Sixty thousand.
New Brunswick	Fifty thousand.
	Two hundred and sixty thousand;

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[62] See *supra* pp. 735-736.

[63] See *supra* p. 225.

and an annual Grant in aid of each Province shall be made, equal to Eighty Cents *per* Head of the Population as ascertained by the Census of One thousand eight hundred and sixty-one, and in the Case of *Nova Scotia* and *New Brunswick,* by each subsequent Decennial Census until the Population of each of those Two Provinces amounts to Four hundred thousand Souls, at which Rate such Grant shall thereafter remain. Such Grants shall be in full Settlement of all future Demands on *Canada,* and shall be paid half-yearly in advance to each Province; but the Government of *Canada* shall deduct from such Grants, as against any Province, all Sums chargeable as Interest on the Public Debt of that Province in excess of the several Amounts stipulated in this Act.

119. *New Brunswick* shall receive by half-yearly Payments in advance from *Canada* for the Period of Ten Years from the Union an additional Allowance of Sixty-three thousand Dollars *per Annum;* but as long as the Public Debt of that Province remains under Seven million Dollars, a Deduction equal to the Interest at Five *per centum per Annum* on such Deficiency shall be made from that Allowance of Sixty-three thousand Dollars. **Further Grant to New Brunswick.**

120. All Payments to be made under this Act, or in discharge of Liabilities created under any Act of the Provinces of *Canada, Nova Scotia,* and *New Brunswick* respectively, and assumed by *Canada,* shall, until the Parliament of *Canada* otherwise directs, be made in such Form and Manner as may from Time to Time be ordered by the Governor General in Council. **Form of Payments.**

121. All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.[64] **Canadian Manufactures, &c.**

122. The Customs and Excise Laws of each Province shall, subject to the Provisions of this Act, continue in force until altered by the Parliament of *Canada.*[65] **Continuance of Customs and Excise Laws.**

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[64] See *supra* pp. 412; 504, n.
[65] See *supra* pp. 238; 412.

Exportation and Importation as between Two Provinces.

123. Where Customs Duties are, at the Union, leviable on any Goods, Wares, or Merchandises in any Two Provinces, those Goods, Wares, and Merchandises may, from and after the Union, be imported from one of those Provinces into the other of them on Proof of Payment of the Customs Duty leviable thereon in the Province of Exportation, and on Payment of such further Amount (if any) of Customs Duty as is leviable thereon in the Province of Importation.

Lumber Dues in New Brunswick.

124. Nothing in this Act shall affect the Right of *New Brunswick* to levy the Lumber Dues provided in Chapter Fifteen of Title Three of the Revised Statutes of *New Brunswick,* or in any Act amending that Act before or after the Union, and not increasing the Amount of such Dues; but the Lumber of any of the Provinces other than *New Brunswick* shall not be subject to such Dues.[66]

Exemption of Public Lands, &c.

125. No Lands or Property belonging to *Canada* or any Province shall be liable to Taxation.[67]

Provincial Consolidated Revenue Fund.

126. Such Portions of the Duties and Revenues over which the respective Legislatures of *Canada, Nova Scotia,* and *New Brunswick* had before the Union Power of Appropriation as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all Duties and Revenues raised by them in accordance with the Special Powers conferred upon them by this Act, shall in each Province form One Consolidated Revenue Fund to be appropriated for the Public Service of the Province.

IX.—MISCELLANEOUS PROVISIONS.

General.

As to Legislative Councillors of Provinces becoming Senators.

127. If any Person being at the passing of this Act a Member of the Legislative Council of *Canada, Nova Scotia,* or *New Brunswick,* to whom a Place in the Senate is offered, does not within Thirty Days thereafter, by Writing under his Hand addressed to the Governor General of the Province of

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[66] See p. 393, n.

[67] See *supra* pp. 238; 415-6.

Canada or to the Lieutenant Governor of *Nova Scotia* or *New Brunswick* (as the Case may be), accept the same, he shall be deemed to have declined the same; and any Person who, being at the passing of this Act a Member of the Legislative Council of *Nova Scotia* or *New Brunswick,* accepts a Place in the Senate, shall thereby vacate his Seat in such Legislative Council.

Oath of Allegiance, &c.

128. Every Member of the Senate or House of Commons of *Canada* shall before taking his Seat therein take and subscribe before the Governor General or some Person authorized by him, and every Member of a Legislative Council or Legislative Assembly of any Province shall before taking his Seat therein take and subscribe before the Lieutenant Governor of the Province or some Person authorized by him, the Oath of Allegiance contained in the Fifth Schedule to this Act; and every Member of the Senate of *Canada* and every member of the Legislative Council of *Quebec*[68] shall also, before taking his Seat therein, take and subscribe before the Governor General, or some Person authorized by him, the Declaration of Qualification contained in the same Schedule.

Continuance of existing Laws, Courts, Officers, &c.

129. Except as otherwise provided by this Act, all Laws in force in *Canada, Nova Scotia,* or *New Brunswick* at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in *Ontario, Quebec, Nova Scotia,* and *New Brunswick* respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of *Great Britain* or of the Parliament of the United Kingdom of *Great Britain* and *Ireland,*) to be repealed, abolished, or altered by the Parliament of *Canada,* or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.[69]

Transfer of Officers to Canada.

130. Until the Parliament of *Canada* otherwise provides, all Officers of the several Provinces having Duties to discharge in relation to Matters other than those coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces shall be Officers of *Canada,* and shall continue to discharge the Duties of their respective Offices under the same Liabilities, Responsibilities, and Penalties as if the Union had not been made.

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[68] Note this peculiar provision as to members of the Legislative Council of Quebec, of which the writer can offer no explanation, unless it is to be found in sec. 73, *q. v.*

[69] See *supra* pp. 161-163; 513.

Appointment of new Officers.

131. Until the Parliament of *Canada* otherwise provides, the Governor General in Council may from Time to Time appoint such Officers as the Governor General in Council deems necessary or proper for the effectual Execution of this Act.

Treaty Obligations.

132. The Parliament and Government of *Canada* shall have all Powers necessary or proper for performing the Obligations of *Canada* or of any Province thereof, as Part of the *British* Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.[70]

Use of English and French Languages.

133. Either the *English* or the *French* Language may be used by any Person in the Debates of the Houses of the Parliament of *Canada* and of the Houses of the Legislature of *Quebec;* and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from Any Court of *Canada* established under this Act, and in or from all or any of the Courts of *Quebec.*

The Acts of the Parliament of *Canada* and of the Legislature of *Quebec* shall be printed and published in both those Languages.

Ontario and Quebec.

Appointment of Executive Officers for Ontario and Quebec.

134. Until the Legislature of *Ontario* or of *Quebec* otherwise provides, the Lieutenant Governors of *Ontario* and *Quebec* may each appoint under the Great Seal of the Province the following Officers, to hold Office during Pleasure, that is to say.—the Attorney General, the Secretary and

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[70] See *supra* pp. 49; 67-69; 687-688.

Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, and in the Case of *Quebec* the Solicitor General, and may, by Order of the Lieutenant Governor in Council, from Time to Time prescribe the Duties of those Officers, and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof, and may also appoint other and additional Officers to hold Office during Pleasure, and may from Time to Time prescribe the Duties of those Officers, and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof.[71]

Powers, Duties, &c., of Executive Officers.

135. Until the Legislature of *Ontario* or *Quebec* otherwise provides, all Rights, Powers, Duties, Functions, Responsibilities, or Authorities at the passing of this Act vested in or imposed on the Attorney General, Solicitor General, Secretary and Registrar of the Province of *Canada,* Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver General, by any Law, Statute, or Ordinance of *Upper Canada, Lower Canada,* or *Canada,* and not repugnant to this Act, shall be vested in or imposed on any officer to be appointed by the Lieutenant Governor for the Discharge of the same or any of them; and the Commissioner of Agriculture and Public Works shall perform the Duties and Functions of the Office of Minister of Agriculture at the passing of this Act imposed by the Law of the Province of *Canada,* as well as those of the Commissioner of Public Works.

Great Seals.

136. Until altered by the Lieutenant Governor in Council, the Great Seals of *Ontario* and *Quebec* respectively shall be the same, or of the same Design, as those used in the Provinces of *Upper Canada* and *Lower Canada* respectively before their Union as the Province of *Canada.*

Construction of temporary Acts.

137. The Words "and from thence to the End of the "then next ensuing Session of the Legislature," or Words to the same Effect, used in any temporary Act of the Province of *Canada* not expired before the Union, shall be construed to extend and apply to the next Session of the Parliament of *Canada* if the Subject Matter of the Act is within the Powers of the same as defined by this Act, or to the next Sessions of the Legislatures of *Ontario* and *Quebec* respectively if the Subject Matter of the Act is within the Powers of the same as defined by this Act.

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[71] See *supra* p. 424.

As to Errors in Names.

138. From and after the Union the Use of the Words "*Upper Canada*" instead of "*Ontario,*" or "*Lower Canada*" instead of "*Quebec,*" in any Deed, Writ, Process, Pleading, Document, Matter, or Thing, shall not invalidate the same.

As to Issue of Proclamations before Union, to commence after Union.

139. Any Proclamation under the Great Seal of the Province of *Canada* issued before the Union to take effect at a Time which is subsequent to the Union, whether relating to that Province, or to *Upper Canada,* or to *Lower Canada,* and the several Matters and Things therein proclaimed, shall be and continue of like Force and Effect as if the Union had not been made.

As to Issue of Proclamations after Union.

140. Any Proclamation which is authorized by any Act of the Legislature of the Province of *Canada* to be issued under the Great Seal of the Province of *Canada,* whether relating to that Province, or to *Upper Canada,* or to *Lower Canada,* and which is not issued before the Union, may be issued by the Lieutenant Governor of *Ontario or of Quebec,* as its Subject Matter requires, under the Great Seal thereof; and from and after the Issue of such Proclamation the same and the several Matters and Things therein proclaimed shall be and continue of the like Force and Effect in *Ontario* or *Quebec* as if the Union had not been made.

Penitentiary.

141. The Penitentiary of the Province of *Canada* shall, until the Parliament of *Canada* otherwise provides, be and continue the Penitentiary of *Ontario* and of *Quebec.*

Arbitration respecting Debts, &c.

142. The Division and Adjustment of the Debts, Credits, Liabilities, Properties, and Assets of *Upper Canada* and *Lower Canada* shall be referred to the Arbitrament of Three

Arbitrators, One chosen by the Government of *Ontario,* One by the Government of *Quebec,* and One by the Government of *Canada;* and the Selection of the Arbitrators shall not be made until the Parliament of *Canada* and the Legislatures of *Ontario and Quebec* have met; and the Arbitrator chosen by the Government of *Canada* shall not be a Resident either in *Ontario* or in *Quebec.*[72]

Division of Records.

143. The Governor General in Council may from Time to Time order that such and so many of the Records, Books, and Documents of the Province of *Canada* as he thinks fit shall be appropriated and delivered either to *Ontario* or to *Quebec,* and the same shall thenceforth be the Property of that Province; and any Copy thereof or Extract therefrom, duly certified by the Officer having charge of the Original thereof, shall be admitted as Evidence.

Constitution of Townships in Quebec.

144. The Lieutenant Governor of *Quebec* may from Time to Time, by Proclamation under the Great Seal of the Province, to take effect from a Day to be appointed therein, constitute Townships in those Parts of the Province of *Quebec* in which Townships are not then already constituted, and fix the Metes and Bounds thereof.

X.—INTERCOLONIAL RAILWAY.

Duty of Government and Parliament of Canada to make Railway herein described.

145. Inasmuch as the Provinces of *Canada, Nova Scotia,* and *New Brunswick* have joined in a Declaration that the Construction of the Intercolonial Railway is essential to the Consolidation of the Union of *British North America,* and to the Assent thereto of *Nova Scotia* and *New Brunswick,* and have consequently agreed that Provision should be made for its immediate Construction by the Government of *Canada:* Therefore, in order to give effect to that Agreement, it shall be the Duty of the Government and Parliament of *Canada* to provide for the Commencement, within Six Months after the Union, of a Railway connecting the River *St. Lawrence* with the City of *Halifax* in *Nova Scotia,* and for the Construction thereof without Intermission, and the Completion thereof with all practicable Speed.

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[72] See *In re Arbitration and Award between Ontario and Quebec* (1878), 4 Cart. Cas. 712, where the Privy Council held that an appointment once made under this section could not afterwards be revoked by the Government by which it was made, and that a majority of the arbitrators could continue the proceedings and make a valid award notwithstanding the absence of the third arbitrators, who had affected to resign, and an attempted revocation of his appointment by the Government appointing him; and the appeal to the Privy Council from an award under this section: *Attorney-General for Quebec* v. *Attorney-General for Ontario,* [1910] A. C. 627. See, also, *supra* pp. 734-6.

XI.—ADMISSION OF OTHER COLONIES.

Power to admit Newfoundland, &c., into the Union.

146. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of *Canada,* and from the Houses of the respective Legislatures of the Colonies or Provinces of *Newfoundland, Prince Edward Island,* and *British Columbia,* to admit those Colonies or Provinces, or any of them, into the Union, and on Address from Houses of the Parliament of *Canada* to admit *Rupert's Land* and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of *Great Britain* and *Ireland.*

As to Representation of Newfoundland and Prince Edward Island in Senate.

147. In case of the Admission of *Newfoundland* and *Prince Edward Island,* or either of them, each shall be entitled to a Representation in the Senate of *Canada* of Four Members, and (notwithstanding anything in this Act) in case of the Admission of *Newfoundland* the normal Number of Senators shall be Seventy-six and their maximum Number shall be Eighty-two; but *Prince Edward Island* when admitted shall be deemed to be comprised in the third of the Three Divisions into which *Canada* is, in relation to the Constitution of the Senate, divided by this Act, and accordingly, after the Admission of *Prince Edward Island,* whether *Newfoundland* is admitted or not, the Representation of *Nova Scotia* and *New Brunswick* in the Senate shall, as Vacancies occur, be reduced from Twelve to Ten Members respectively, and the Representation of each of those Provinces shall not be increased at any Time beyond Ten, except under the Provisions of this Act for the Appointment of Three or Six additional Senators under the Direction of the Queen.

SCHEDULES.

The FIRST SCHEDULE.

Electoral Districts of Ontario.

A.

EXISTING ELECTORAL DIVISIONS.

COUNTIES.

1. Prescott.
2. Glengarry.
3. Stormont.
4. Dundas.
5. Russell.
6. Carleton.
7. Prince Edward.
8. Halton.
9. Essex.

RIDINGS OF COUNTIES.

10. North Riding of Lanark.
11. South Riding of Lanark.
12. North Riding of Leeds and North Riding of Grenville.
13. South Riding of Leeds.
14. South Riding of Grenville.
15. East Riding of Northumberland.
16. West Riding of Northumberland (excepting therefrom the Township of South Monaghan).
17. East Riding of Durham.
18. West Riding of Durham.
19. North Riding of Ontario.
20. South Riding of Ontario.
21. East Riding of York.

22. West Riding of York.
23. North Riding of York.
24. North Riding of Wentworth.
25. South Riding of Wentworth.
26. East Riding of Elgin.
27. West Riding of Elgin.
28. North Riding of Waterloo.
29. South Riding of Waterloo.
30. North Riding of Brant.
31. South Riding of Brant.
32. North Riding of Oxford.
33. South Riding of Oxford.
34. East Riding of Middlesex.

CITIES, PARTS OF CITIES, AND TOWNS.

35. West Toronto.
36. East Toronto.
37. Hamilton.
38. Ottawa.
39. Kingston.
40. London.
41. Town of Brockville, with the Township of Elizabethtown thereto attached.
42. Town of Niagara, with the Township of Niagara thereto attached.
43. Town of Cornwall, with the Township of Cornwall thereto attached.

B.

NEW ELECTORAL DIVISIONS.

44. The Provisional Judicial District of ALGOMA.

The County of BRUCE, divided into Two Ridings, to be called respectively the North and South Ridings:—

45. The North Riding of Bruce to consist of the Townships of Bury, Lindsay, Eastnor, Albemarle, Amabel, Arran, Bruce, Elderslie, and Langeen, and the Village of Southampton.

46. The South Riding of Bruce to consist of the Townships of Kincardine (including the Village of Kincardine), Greenock, Brant, Huron, Kinross, Culross, and Carrick.

The County of HURON, divided into Two Ridings, to be called respectively the North and South Ridings:—

47. The North Riding to consist of the Townships of Ashfield, Wawanosh, Turnberry, Howick, Morris, Grey, Colborne, Hullett, including Village of Clinton, and McKillop.

48. The South Riding to consist of the Town of Goderich and the Townships of Goderich, Tuckersmith, Stanley, Hay, Usborne, and Stephen.

The County of MIDDLESEX, divided into Ridings, to be called respectively the North, West, and East Ridings:—

49. The North Riding to consist of the Townships of McGillivray and Biddulph (taken from the County of Huron), and Williams East, Williams West, Adelaide, and Lobo.

50. The West Riding to consist of the Townships of Delaware, Carradoc, Metcalfe, Mosa, and Ekfrid, and the Village of Strathroy.

[The East Riding to consist of the Townships now embraced therein, and be bounded as it is at present.]

51. The County of LAMBTON to consist of the Townships of Bosanquet, Warwick, Plympton, Sarnia, Moore, Enniskillen, and Brooke, and the Town of Sarnia.

52. The County of KENT to consist of the Townships of Chatham, Dover, East Tilbury, Romney, Raleigh, and Harwich, and the Town of Chatham.

53. The County of **Bothwell** to consist of the Townships of Sombra, Dawn, and Euphemia (taken from the County of Lambton), and the Townships of Zone, Camden with the Gore thereof, Orford, and Howard (taken from the County of Kent).

The County of **Grey**, divided into Two Ridings, to be called respectively the South and North Ridings:—

54. The South Riding to consist of the Townships of Bentinck, Glenelg, Artemesia, Osprey, Normanby, Egremont, Proton, and Melancthon.

55. The North Riding to consist of the Townships of Collingwood, Euphrasia, Holland, Saint-Vincent, Sydenham, Sullivan, Derby, and Keppe, Sarawak and Brooke, and the Town of Owen Sound.

The County of **Perth**, divided into Two Ridings, to be called respectively the South and North Ridings:—

56. The North Riding to consist of the Townships of Wallace, Elma, Logan, Ellice, Mornington, and North Easthope, and the Town of Stratford.

57. The South Riding to consist of the Townships of Blanchard, Downie, South Easthope, Fullarton, Hibbert, and the Villages of Mitchell and Ste. Marys.

The County of **Wellington**, divided into Three Ridings, to be called respectively North, South, and Centre Ridings:—

58. The North Riding to consist of the Townships of Amaranth, Arthur, Luther, Minto, Maryborough, Peel, and the Village of Mount Forest.

59. The Centre Riding to consist of the Townships of Garafraxa, Erin, Eramosa, Nichol, and Pilkington, and the Villages of Fergus and Elora.

60. The South Riding to consist of the Town of Guelph, and the Townships of Guelph and Puslinch.

The County of NORFOLK, divided into Two Ridings, to be called respectively the South and North Ridings:—

61. The South Riding to consist of the Townships of Charlotteville, Houghton, Walsingham, and Woodhouse, and with the Gore thereof.

62. The North Riding to consist of the Townships of Middleton, Townsend, and Windham, and the Town of Simcoe.

63. The County of HALDIMAND to consist of the Townships of Oneida, Seneca, Cayuga North, Cayuga South, Raynham, Walpole, and Dunn.

64. The County of MONCK to consist of the Townships of Canborough and Moulton, and Sherbrooke, and the Village of Dunville (taken from the County of Haldimand), the Townships of Caistor and Gainsborough (taken from the County of Lincoln), and the Townships of Pelham and Wainfleet (taken from the County of Welland).

65. The County of LINCOLN to consist of the Townships of Clinton, Grantham, Grimsby, and Louth, and the Town of St. Catherines.

66. The County of WELLAND to consist of the Townships of Bertie, Crowland, Humberstone, Stamford, Thorold, and Willoughby, and the Villages of Chippewa, Clifton, Fort Erie, Thorold, and Welland.

67. The County of PEEL to consist of the Townships of Chinguacousy, Toronto, and the Gore of Toronto, and the Villages of Brampton and Streetsville.

68. The County of CARDWELL to consist of the Townships of Albion and Caledon (taken from the County of Peel), and the Townships of Adjala and Mono (taken from the County of Simcoe).

The County of SIMCOE, divided into Two Ridings, to be called respectively the South and the North Ridings:—

69. The South Riding to consist of the Townships of West Gwillimbury, Tecumseth, Innisfil, Essa, Tosorontio, Mulmur, and the Village of Bradford.

70. The North Riding to consist of the Townships of Nottawasaga, Sunnidale, Vespra, Flos, Oro, Medonte, Orillia and Matchedash, Tiny and Tay, Balaklava and Robinson, and the Towns of Barrie and Collingwood.

The County of VICTORIA, divided into Two Ridings, to be called respectively the South and North Ridings:—

71. The South Riding to consist of the Townships of Ops, Mariposa, Emily, Verulam, and the Town of Lindsay.

72. The North Riding to consist of the Townships of Anson, Bexley, Carden, Dalton, Digby, Eldon, Fenelon, Hindon, Laxton, Lutterworth, Macaulay and Draper, Sommerville, and Morrison, Muskoka, Monck and Watt (taken from the County of Simcoe), and any other surveyed Townships lying to the North of the said North Riding.

The County of PETERBOROUGH, divided into Two Ridings, to be called respectively the West and East Ridings:—

73. The West Riding to consist of the Townships of South Monaghan (taken from the County of Northumberland), North Monaghan, Smith, and Ennismore, and the Town of Peterborough.

74. The East Riding to consist of the Townships of Asphodel, Belmont and Methuen, Douro, Dummer, Galway, Harvey, Minden, Stanhope and Dysart, Otonabee, and Snowden, and the Village of Ashburnham, and any other surveyed Townships lying to the North of the said East Riding.

The County of HASTINGS, divided into Three Ridings, to be called respectively the West, East, and North Ridings:—

75. The West Riding to consist of the Town of Belleville, the Township of Sydney, and the Village of Trenton.

76. The East Riding to consist of the Townships of Thurlow, Tyendinaga, and Hungerford.

77. The North Riding to consist of the Townships of Rawdon, Huntingdon, Madoc, Elzevir, Tudor, Marmora, and Lake, and the Village of Stirling, and any other surveyed Townships lying to the North of the said North Riding.

78. The County of LENNOX to consist of the Townhips of Richmond, Adolphustown, North Fredericksburg, South Fredericksburg, Ernest Town, and Amherst Island, and the Village of Napanee.

79. The County of ADDINGTON to consist of the Townships of Camden, Portland, Sheffield, Hinchinbroke, Kaladar, Kennebec, Olden, Oso, Anglesea, Barrie, Clarendon, Palmerston, Effingham, Abinger, Miller, Canonto, Denbigh, Loughborough, and Bedford.

80. The County of FRONTENAC to consist of the Townships of Kingston, Wolfe Island, Pittsburg and Howe Island, and Storrington.

The County of RENFREW, divided into Two Ridings, to be called respectively the South and North Ridings:—

81. The South Riding to consist of the Townships of McNab, Bagot, Blithfield, Brougham, Horton, Admaston, Grattan, Matawatchan, Griffith, Lyndoch, Raglan, Radcliffe, Brudenell, Sebastopol, and the Villages of Arnprior and Renfrew.

82. The North Riding to consist of the Townships of Ross, Bromley, Westmeath, Stafford, Pembroke, Wilberforce, Alice, Petawawa, Buchanan, South

Algona, North Algona, Fraser, McKay, Wylie, Rolph, Head, Maria, Clara, Haggerty, Sherwood, Burns, and Richards, and any other surveyed Townships lying north-westerly of the said North Riding.

Every Town and incorporated Village existing at the Union, not specially mentioned in this Schedule, is to be taken as Part of the County or Riding within which it is locally situate.

The SECOND SCHEDULE.

Electoral Districts of Quebec specially fixed.

COUNTIES OF—

Pontiac.
Ottawa.
Argenteuil.
Huntingdon.
Missisquoi.
Brome.
Shefford.
Stanstead.
Compton.
Wolfe and Richmond.
Megantic.

TOWN OF SHERBROOKE.

The THIRD SCHEDULE.

Provincial Public Works and Property to be the Property of Canada.

1. Canals, with Lands and Water Power Connected therewith.
2. Public Harbours.
3. Lighthouses and Piers, and Sable Island.
4. Steamboats, Dredges, and public Vessels.
5. Rivers and Lake Improvements.
6. Railways[73] and Railway Stocks, Mortgages, and other Debts due by Railway Companies.

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[73] See *supra* p. 228.

7. Military Roads.
8. Custom Houses, Post Offices, and all other Public Buildings, except such as the Government of Canada appropriate for the Use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government, and known as Ordnance Property.
10. Armouries, Drill Sheds, Military Clothing, and Munitions of War, and Lands set apart for general Public Purposes.

The FOURTH SCHEDULE.

Assets to be the Property of Ontario and Quebec conjointly.

Upper Canada Building Fund.
Lunatic Asylums.
Normal School.
Court Houses
in
Aylmer, } Lower Canada.
Montreal,
Kamouraska,
Law Society, Upper Canada.
Montreal Turnpike Trust.
University Permanent Fund.
Royal Institution.
Consolidated Municipal Loan Fund, Upper Canada.
Consolidated Municipal Loan Fund, Lower Canada.
Agricultural Society, Upper Canada.
Lower Canada Legislative Grant.
Quebec Fire Loan.
Tamisconata Advance Account.
Quebec Turnpike Trust.
Education—East.
Building and Jury Fund, Lower Canada.
Municipalities Fund.
Lower Canada Superior Education Income Fund.

The FIFTH SCHEDULE.

OATH OF ALLEGIANCE.

I *A.B.* do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria.

Note.—The Name of the King or Queen of the United Kingdom of Great Britain and Ireland for the Time being is to be substituted from Time to Time, with proper Terms of Reference thereto.

DECLARATION OF QUALIFICATION.

I *A.B.* do declare and testify, That I am by Law duly qualified to be appointed a Member of the Senate of Canada [*or as the Case may be*], and that I am legally or equitably seised as of Freehold for my own Use and Benefit of Lands or Tenements held in Free and Common socage [*or* seised or possessed for my own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture (*as the Case may be*),] in the Province of Nova Scotia [*or as the Case may be*] of the Value of Four thousand Dollars over and above all Rents, Dues, Debts, Mortgages, Charges, and Incumbrances due or payable out of or charged on or affecting the same, and that I have not collusively or colourably obtained a Title to or become possessed of the said Lands and Tenements or any Part thereof for the Purpose of enabling me to become a Member of the Senate of Canada [*or as the Case may be*], and that my Real and Personal Property are together worth Four thousand Dollars over and above my Debts and Liabilities.

ACT RESPECTING RUPERT'S LAND.

32-33 VICTORIÆ, CHAPTER 3.

An Act for the temporary Government of Rupert's Land and the North-Western Territory when united with Canada.

[Assented to June 22nd, 1869.]

Preamble.

Whereas it is probable that Her Majesty the Queen, may, pursuant to "The British North America Act, 1867," be pleased to admit Rupert's Land and the North-Western Territory into the Union or Dominion of Canada, before the next Session of the Canadian Parliament: And whereas it is expedient to prepare for the transfer of the said Territories from the Local Authorities to the Government of Canada at the time appointed by the Queen for such admission, and to make some temporary provision for the Civil Government of such Territories until more permanent arrangements can be made by the Government and Legislature of Canada; Therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

Name of Territories.

1. The said Territories when admitted as aforesaid shall be styled and known as "The North-West Territories."

Appointment and functions of Lieutenant-Governor.

2. It shall be lawful for the Governor by any Order or Orders to be by him from time to time made with the advice of the Privy Council (and subject to such conditions and restrictions as to him shall seem meet), to authorize and empower such Officer as he may from time to time appoint as Lieutenant-Governor of the North-West Territories to make provision for the administration of Justice therein and generally to make, ordain and establish all such Laws (Power to him to make laws.) Institutions and Ordinances as may be necessary for the Peace, Order and Good Government of Her Majesty's subjects and others therein: provided that all such Orders in (Proviso.) Council and all Laws and Ordinances so to be made as aforesaid, shall be laid before both Houses of Parliament as soon as conveniently may be after the making and enactment thereof respectively.

Instructions to Lieutenant Governor.

3. The Lieutenant-Governor shall administer the Government under instructions from time to time given him by Order in Council.

Appointment of Council to Lieutenant-Governor.

4. The Governor may, with the advice of the Privy Council, constitute and appoint, by warrant under His Sign Manual, a Council of not exceeding fifteen nor less than seven persons, to aid the Lieutenant-Governor in the administration of affairs, with such powers as may be from time to time conferred upon them by Order in Council.

Existing laws to remain in force.

5. All the laws in force in Rupert's Land and the North-Western Territory at the time of their admission into the Union shall so far as they are consistent with "The British North America Act, 1867,"—with the terms and conditions of such admission approved of by the Queen under the 146th Section thereof—and with this Act—remain in force until altered by the Parliament of Canada, or by the Lieutenant-Governor under the authority of this Act.

Public officers, &c., to retain office.

6. All Public Officers and Functionaries holding office in Rupert's Land and the North-Western Territory at the time of their admission into the Union, excepting the public Officer or Functionary at the head of the administration of affairs, shall continue to be public Officers and Functionaries of the North-West Territories with the same duties and powers as before until otherwise ordered by the Lieutenant-Governor under the authority of this Act.

Duration of this Act.

7. This Act shall continue in force until the end of the next Session of Parliament.

THE BRITISH NORTH AMERICA ACT, 1871.

34 VICTORIÆ, CHAPTER 28.

An Act respecting the establishment of Provinces in the Dominion of Canada.

[29th June, 1871.]

Whereas doubts have been entertained respecting the powers of the Parliament of Canada to establish Provinces in territories admitted, or which may hereafter be admitted, into the Dominion of Canada, and to provide for the representation of such Provinces in the said Parliament, and it is expedient to remove such doubts, and to vest such powers in the said Parliament:

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited for all purposes as "The British North America Act, 1871."

Parliament of Canada may establish new Provinces and provide for the constitution, etc., thereof.

2. The Parliament of Canada may from time to time, establish new provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.

Alteration of limits of Provinces.

3. The Parliament of Canada, may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.[74]

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[74] As to the interpretation of this section, and as to the words, terms and conditions embracing constitutional limitations of the powers of a province in respect of territory so added to it, see *North Cypress* v. *Canadian Pacific R. W. Co.* (1904), 35 S. C. R. 550, 14 Man. 382.

Parliament may legislate for any territory not included in a Province.

4. The Parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any Province.

Confirmation of Acts of Parliament of Canada, 32 & 33 Vict. (Canadian) cap. 3, 33 Vict. (Canadian) cap. 3.

5. The following Acts passed by the said Parliament of Canada, and intituled respectively, —

> "An Act for the temporary government of Rupert's Land, and the North Western Territory when united with Canada;" and
>
> "An Act to amend and continue the Act thirty-two and thirty-three Victoria and to establish and provide for the government of the Province of Manitoba."

shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor-General of the said Dominion of Canada.

Limitation of powers of Parliament of Canada to legislate for an established Province.

6. Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament in so far as it relates to the Province of Manitoba, or of any other Act hereinafter establishing new Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly and to make laws respecting elections in the said Province.

THE PARLIAMENT OF CANADA ACT, 1875.

38-39 VICTORIÆ, CHAPTER 38.

An Act to remove certain doubts with respect to the powers of the Parliament of Canada under section eighteen of the British North America Act, 1867.

[19th July, 1875.]

Whereas by section eighteen of the British North America Act, 1867, it is provided as follows: "The privileges, immunities, and powers to be held, enjoyed and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof:"

And whereas doubts have arisen with regard to the power of defining by an Act of the Parliament of Canada, in pursuance of the said section, the said privileges, powers, or immunities; and it is expedient to remove such doubts:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Substitution of new section for section 18 of 30-31 Vict. c. 3.

1. Section eighteen of the British North America Act, 1867, is hereby repealed, without prejudice to anything done under that section, and the following section shall be substituted for the section so repealed.

The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed and exercised by the

Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.

Confirmation of Act of Parliament of Canada.

2. The Act of the Parliament of Canada passed in the thirty-first year of the reign of Her present Majesty, chapter twenty-four, intituled "An Act to provide for oaths to witnesses being administered in certain cases for the purposes of either House of Parliament," shall be deemed to be valid, and to have been valid as from the date at which the royal assent was given thereto by the Governor-General of the Dominion of Canada.

Short title.

3. This Act may be cited as the Parliament of Canada Act, 1875.

THE BRITISH NORTH AMERICA ACT, 1886.

49-50 VICTORIÆ, CHAPTER 35.

An Act respecting the Representation in the Parliament of Canada of Territories which for the time being form part of the Dominion of Canada, but are not included in any Province.

[25th June, 1886.]

Whereas it is expedient to empower the Parliament of Canada to provide for the representation in the Senate and House of Commons of Canada, or either of them, of any territory which for the time being forms part of the Dominion of Canada but is not included in any province:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

1. The Parliament of Canada may from time to time make provision for the representation in the Senate and House of Commons of Canada, or in either of them, of any territories which for the time being form part of the Dominion of Canada, but are not included in any province thereof,

Provision by Parliament of Canada for representation of territories.

2. Any Act passed by the Parliament of Canada before the passing of this Act for the purpose mentioned in this Act shall, if not disallowed by the Queen, be, and shall be deemed to have been, valid and effectual from the date at which it received the assent, in Her Majesty's name, of the Governor-General of Canada.

Effect of Acts of Parliament of Canada.

It is hereby declared that any Act passed by the Parliament of Canada, whether before or after the passing of this Act, for the purpose mentioned in this Act or in the British North America Act, 1871, has effect notwithstanding anything in the British North America Act, 1867, and the number of Senators or the number of members of the House of Commons specified in the last mentioned Act is increased by the number of Senators or of Members, as the case may be, provided by any such Act of the Parliament of Canada for the representation of any provinces or territories of Canada.

34 & 35 Vict. c. 28.

30 & 31 Vict. c. 3.

Short title and construction. **3.** This Act may be cited as the British North America Act, 1886.

30 & 31 Vict. c. 3. 34 & 35 Vict. c. 28. This Act and the British North America Act, 1867, and the British North America Act, 1871, shall be construed together, and may be cited together as the British North America Acts, 1867 to 1886.

THE BRITISH NORTH AMERICA ACT, 1907.

7 Edward VII., Chapter II.

An Act to make further provision with respect to the sums to be paid by Canada to the several Provinces of the Dominion.

[9th August, 1907.]

Whereas an address has been presented to His Majesty by the Senate and Commons of Canada in the terms set forth in the schedule to this Act:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Payments to be made by Canada to provinces.

1. (1) The following grants shall be made yearly by Canada to every province, which at the commencement of this Act is a province of the Dominion, for its local purposes and the support of its Government and Legislature:

(*a*) A fixed grant—

Where the population of the province is under one hundred and fifty thousand, of one hundred thousand dollars;

Where the population of the province is one hundred and fifty thousand, but does not exceed two hundred thousand, of one hundred and fifty thousand dollars;

Where the population of the province is two hundred thousand, but does not exceed four hundred thousand, of one hundred and eighty thousand dollars;

Where the population of the province is four hundred thousand, but does not exceed eight hundred thousand, of one hundred and ninety thousand dollars;

Where the population of the province is eight hundred thousand, but does not exceed one million five hundred thousand, of two hundred and twenty thousand dollars;

Where the population of the province exceeds one million five hundred thousand, of two hundred and forty thousand dollars; and (*b*) Subject to the special provisions of this Act as to the provinces of British Columbia and Prince Edward Island, a grant at the rate of eighty cents per head of the population of the province up to the number of two million five hundred thousand, and at the rate of sixty cents per head of so much of the population as exceeds that number.

(2) An additional grant of one hundred thousand dollars shall be made yearly to the province of British Columbia for a period of ten years from the commencement of this Act.

(3) The population of a province shall be ascertained from time to time in the case of the provinces of Manitoba, Saskatchewan, and Alberta respectively by the last quinquennial census of statutory estimate of population made under the Acts establishing those provinces or any other Act of the Parliament of Canada making provision for the purpose, and in the case of any other province by the last decennial census for the time being.

(4) The grants payable under this Act shall be paid half-yearly in advance to each province.

(5) The grants payable under this Act shall be substituted for the grants or subsidies (in this Act referred to as existing grants) payable for the like purposes at the commencement of this Act to the several provinces of the Dominion under the provisions of section one hundred and eighteen of the British North America Act, 1867, or of any Order in Council establishing a province, or of any Act of the Parliament of Canada containing directions for the payment of any such grant or subsidy, and those provisions shall cease to have effect.

(6) The Government of Canada shall have the same power of deducting sums charged against a province on account of the interest on public debt in the case of the grant payable under this Act to the province as they have in the case of the existing grant.

(7) Nothing in this Act shall affect the obligation of the Government of Canada to pay to any province any grant which is payable to that province, other than the existing grant for which the grant under this Act is substituted.

(8) In the case of the provinces of British Columbia and Prince Edward Island, the amount paid on account of the grant payable per head of the population to the provinces

under this Act shall not at any time be less than the amount of the corresponding grant payable at the commencement of this Act; and if it is found on any decennial census that the population of the province has decreased since the last decennial census, the amount paid on account of the grant shall not be decreased below the amount then payable, notwithstanding the decrease of the population.

2. This Act may be cited as the British North America Act, 1907, and shall take effect as from the first day of July nineteen hundred and seven. **Short title and interpretation.**

RUPERT'S LAND ACT, 1868.

31-32 VICTORIÆ, CHAPTER 105.

An Act for enabling Her Majesty to accept a Surrender upon Terms of the Lands, Privileges, and Rights of "The Governor and Company of Adventurers of England trading into Hudson's Bay," and for admitting the same into the Dominion of Canada.

[July 31st, 1868.]

Recital of Charter of Hudson's Bay Company, 22 Car. 2.

Whereas by certain Letters Patent granted by His late Majesty King Charles the Second, in the Twenty-second year of His Reign, certain Persons therein named were incorporated by the Name of "The Governor and Company of Adventurers of England trading into Hudson's Bay," and certain Lands and Territories, Rights of Government and other Rights, Privileges, Liberties, Franchises, Powers and Authorities, were thereby granted or purported to be granted to the said Governor and Company in His Majesty's Dominions in North America;

And whereas by the British North America Act, 1867, it was (amongst other things) enacted that it should be lawful for Her Majesty, by and with the Advice of Her Majesty's most Honorable Privy Council, on Address from the Houses of the Parliament of Canada, to admit Rupert's Land and the North-Western Territory, or either of them, into the Union on such Terms and Conditions as are in the Address expressed and as Her Majesty thinks fit to approve, subject to the provisions of the said Act;

Recital of Agreement of Surrender.

And whereas for the Purpose of carrying into effect the Provisions of the said British North America Act, 1867, and of admitting Rupert's Land into the said Dominion as aforesaid upon such Terms as Her Majesty thinks fit to approve, it is expedient that the said Lands, Territories, Rights, Privileges, Liberties, Franchises, Powers, and Authorities, so far as the same have been lawfully granted to the said Company, should be surrendered to Her Majesty, Her Heirs and Successors, upon such Terms and Conditions as may be agreed upon by and between Her Majesty and the said Governor and Company as hereinafter mentioned:

Be it therefore enacted by the Queen's Most Excellent Majesty by and with the Advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same as follows:

Short Title.

1. This Act may be cited as the "Rupert's Land Act, 1868."

Definition of "Rupert's Land."

2. For the purposes of this Act the Term "Rupert's Land" shall include the whole of the Lands and Territories held or claimed to be held by the said Governor and Company.

Power to Her Majesty to accept Surrender of Lands, etc., of the Company upon certain Terms.

3. It shall be competent for the said Governor and Company to surrender to Her Majesty and for Her Majesty by any Instrument under Her Sign Manual and Signet to accept a Surrender of all or any of the Lands, Territories, Rights, Privileges, Liberties, Franchises, Powers and Authorities, whatsoever granted or purported to be granted by the said Letters Patent to the said Governor and Company within Rupert's Land upon such Terms and Conditions as shall be agreed upon by and between Her Majesty and the said Governor and Company; provided, however, that such Surrender shall not be accepted by Her Majesty until the Terms and Conditions upon which Rupert's Land shall be admitted into the said Dominion of Canada, shall have been approved of by Her Majesty and embodied in an Address to Her Majesty from both the Houses of the Parliament of Canada in pursuance of the One Hundred and forty-sixth Section of the British North America Act, 1867; and that the said surrender and acceptance thereof shall be null and void unless within a Month from the Date of such Acceptance Her Majesty does by Order in Council under the Provisions of the said last recited Act admit Rupert's Land into the said Dominion; provided further, that no charge shall be imposed by such Terms upon the Consolidated Fund of the United Kingdom.

Extinguishment of all Rights of the Company.

4. Upon the acceptance by Her Majesty of such Surrender all Rights of Government and Proprietary Rights, and all other Privileges, Liberties, Franchises, Powers, and Authorities, whatsoever, granted or purported to be granted by the said Letters Patent to the said Governor and Company within Rupert's Land, and which shall have been so surrendered, shall be absolutely extinguished: provided that

nothing herein contained shall prevent the said Governor and Company from continuing to carry on in Rupert's Land or elsewhere Trade and Commerce.

Power to Her Majesty by Order in Council to admit Rupert's Land into and form Part of the Dominion of Canada.

5. It shall be competent to Her Majesty by any such Order or Orders in Council as aforesaid, on Address from the Houses of the Parliament of Canada to declare that Rupert's Land shall from a date to be therein mentioned, be admitted into and become part of the Dominion of Canada and thereupon it shall be lawful for the Parliament of Canada from the Date aforesaid to make, ordain and establish within the Land and Territory so admitted as aforesaid all such Laws, Institutions and Ordinances, and to constitute such Courts and Officers as may be necessary for the Peace, Order and Good Government of Her Majesty's subjects and others therein: Provided that, until otherwise enacted by the said Parliament of Canada, all the Powers, Authorities, and Jurisdiction of the several Courts of Justice now established in Rupert's Land, and of the several Officers thereof, and of all Magistrates and Justices now acting within the said Limits, shall continue in full force and effect therein.

Jurisdiction of present Courts and Officers continued.

THE MANITOBA ACT.

33 VICTORIÆ, CHAPTER 3.[75]

An Act to amend and continue the Act 32 and 33 Victoriæ, chapter 3; and to establish and provide for the Government of Manitoba.

[Assented to May 12th, 1870.]

Preamble.

Whereas it is probable that Her Majesty, The Queen, may, pursuant to the British North America Act, 1867, be pleased to admit Rupert's Land and the North-Western Territory into the Union or Dominion of Canada, before the next Session of the Parliament of Canada:

And whereas it is expedient to prepare for the transfer of the said Territories to the Government of Canada at the time appointed by the Queen for such admission:

And whereas it is expedient also to provide for the organization of part of the said Territories as a province, and for the establishment of a Government therefor, and to make provision for the Civil Government of the remaining part of the said Territories, not included within the limits of the Province:

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Province to be formed out of N.-W. territory when united to Canada.

1. On, from and after the day upon which the Queen, by and with the advice and consent of Her Majesty's Most Honorable Privy Council, under the authority of the 146th Section of the British North America Act, 1867, shall by Order in Council in that behalf, admit Rupert's Land and the North-Western Territories into the Union or Dominion of Canada, there shall be formed out of the same a province, which shall be one of the Provinces of the Dominion of Canada, and which shall be called the Province of Manitoba, and be bounded as follows: that is to say, commencing at the point where the meridian of ninety-six degrees west long-

Its name and boundaries.

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[75] This Act was confirmed by the British North America Act 1871, *supra* p. 817. See for some notice of the circumstances under which each of the new provinces were admitted into the Dominion: *Attorney-General of Prince Edward Island* v. *Attorney-General of Dominion*, [1905] A. C. at pp. 45-7.

itude from Greenwich intersects the parallel of forty-nine degrees north latitude,—thence due west along the said parallel of forty-nine degrees north latitude (which forms a portion of the boundary line between the United States of America and the said North-Western Territory) to the meridian of ninety-nine degrees of west longitude,—thence due north along the said meridian of ninety-nine degrees west longitude to the intersection of the same with the parallel of fifty degrees and thirty minutes north latitude,—thence due east along the said parallel of fifty degrees and thirty minutes north latitude to its intersection with the before-mentioned meridian of ninety-six degrees west longitude,—thence due south along the said meridian of ninety-six degrees west longitude to the place of beginning.

Certain provisions of B. N. A. Act 1867, to apply to Manitoba.

2. On, from and after the said day on which the order of the Queen in Council shall take effect as aforesaid, the provisions of the British North America Act, 1867, shall, except those parts thereof which are in terms made, or, by reasonable intendment may be held to be specially applicable to or only to affect one or more, but not the whole of the Province now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba, in the same way, and to the like extent as they apply to the several Provinces of Canada, and as if the Province of Manitoba had been one of the provinces originally united by the said Act.

Representation in the Senate.

3. The said Province shall be represented in the Senate of Canada by two Members, until it shall have, according to decennial census, a population of fifty thousand souls, and from thenceforth it shall be represented therein by three Members, until it shall have, according to decennial census, a population of seventy-five thousand souls, and from thenceforth it shall be represented therein by four Members.

Representation in the House of Commons.

4. The said Province shall be represented, in the first instance, in the House of Commons in Canada, by four Members and for that purpose shall be divided by proclamation of the Governor General, into four Electoral Districts each of which shall be represented by one Member: Provided that on the completion of the census in the year 1881, and of each decennial census afterwards the representation of the said Province shall be readjusted according to the provisions of the fifty-first section of the British North America Act, 1867.

5. Until the Parliament of Canada otherwise provides, the qualifications of voters at Elections of Members of the House of Commons shall be the same as for the Legislative Assembly hereinafter mentioned: And no person shall be qualified to be elected, or to sit and vote as a Member for any Electoral District, unless he is a duly qualified voter within the said Province. **Qualification of voters and members.**

6. For the said Province there shall be an Officer styled the Lieutenant Governor, appointed by the Governor General in Council by instrument under the Great Seal of Canada. **Lieutenant-Governor.**

7. The Executive Council of the Province shall be composed of such persons, and under such designations, as the Lieutenant Governor shall, from time to time think fit: and, in the first instance, of not more than five persons. **Executive Council.**

8. Unless and until the Executive Government of the Province otherwise directs, the seat of Government of the same shall be at Fort Garry, or within one mile thereof. **Seat of Government.**

9. There shall be a Legislature for the Province, consisting of the Lieutenant Governor, and of two Houses, styled respectively, the Legislative Council of Manitoba, and the Legislative Assembly of Manitoba. **Legislature.**

10. The Legislative Council shall, in the first instance, be composed of seven Members, and after the expiration of four years from the time of the first appointment of such seven Members, may be increased to not more than twelve Members. **Legislative Council.** Every Member of the Legislative Council shall be appointed by the Lieutenant-Governor in the Queen's name, by Instrument under the Great Seal of Manitoba, and shall hold office for the term of his life, unless and until the Legislature of Manitoba otherwise provides under the British North America Act, 1867. **Members and their appointment, etc.**

11. The Lieutenant-Governor may, from time to time, by Instrument under the Great Seal, appoint a member of the Legislative Council to be Speaker thereof, and may remove him and appoint another in his stead. **Speaker.**

12. Until the Legislature of the Province otherwise provides, the presence of a majority of the whole number of the Legislative Council, including the Speaker shall be necessary to constitute a meeting for the exercise of its powers. **Quorum.**

Voting.

13. Questions arising in the Legislative Council shall be decided by a majority of voices, and the Speaker shall in all cases have a vote and when the voices are equal the decisions shall be deemed to be in the negative.

Equality of votes.

Legislative Assembly.

14. The Legislative Assembly shall be composed of twenty-four members to be elected to represent the Electoral Divisions into which the said Province may be divided by the Lieutenant-Governor as hereinafter mentioned.

Quorum.

15. The presence of a majority of the Members of the Legislative Assembly shall be necessary to constitute a meeting of the House for the exercise of its powers; and for that purpose the Speaker shall be recognized as a Member.

Electoral Divisions.

16. The Lieutenant-Governor shall (within six months of the date of the Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the Union), by Proclamation under the Great Seal, divide the said Province into twenty-four Electoral Divisions, due regard being had to existing Local Divisions and population.

Qualification of voters.

17. Every male person shall be entitled to vote for a Member, to serve in the Legislative Assembly for any Electoral Division, who is qualified as follows, that is if he is:—

1. Of the full age of twenty-one years, and not subject to any legal incapacity:

2. A subject of Her Majesty by birth or naturalization:

3. And a bona fide householder within the Electoral Division, at the date of the Writ of Election for the same, and has been a bona fide householder for one year next before the said date; or,

Special,—for first election only.

4. If, being, of the full age of twenty-one years and not subject to any legal incapacity and a subject of Her Majesty by birth or naturalization, he was, at the time within twelve months prior to the passing of this Act, and (though in the interim temporarily absent) is at the time of such election a bona fide householder, and was resident within the Electoral Division at the date of the Writ of Election for the same:

Proviso.

But this fourth sub-section shall apply only to the first election to be held under this Act for Members to serve in the Legislative Assembly aforesaid.

Proceedings at first

18. For the first election of Members to serve in the Legislative Assembly, and until the Legislature of the Province otherwise provides, the Lieutenant-Governor shall cause writs to be issued, by such person in such form and addressed to such Returning Officers as he thinks fit; and for the first election, and until the Legislature of the province otherwise provides, the Lieutenant-Governor shall, by proclamation, prescribe and declare the oaths to be taken by voters, the powers and duties of Returning and Deputy Returning Officers, the proceedings to be observed at such election, and the period during which such election may be continued, and such other provisions in respect to such first election as he may think fit. election, &c.,—how regulated.

19. Every Legislative Assembly shall continue for four years from the date of the return of the writs for returning the same (subject nevertheless to being sooner dissolved by the Lieutenant-Governor), and no longer; and the first Session thereof shall be called at such time as the Lieutenant-Governor shall appoint. Duration of Legislative Assembly.

20. There shall be a Session of the Legislature once at least in every year, so that twelve months shall not intervene between the last sitting of the Legislature in one Session and its first sitting in the next Session. Sessions at least once a year.

21. The following provisions of the British North America Act, 1867, respecting the House of Commons of Canada, shall extend and apply to the Legislative Assembly, that is to say:—Provisions relating to the election of a Speaker, originally, and on vacancies,—the duties of the Speaker—the absence of the Speaker and the mode of voting, as if those provisions were here re-enacted and made applicable in terms to the Legislative Assembly. Certain provisions of B. N. A. Act 1867, to apply.

22. In and for the Province, the said Legislature may exclusively make laws in relation to Education subject and according to the following provisions:— Legislation touching schools subject to certain provisions.

(1) Nothing in any such Law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have by Law or practice in the Province at the Union:

(2) An appeal shall lie to the Governor-General in Council from any Act or decision of the Legislature of the Province or of any Provincial Authority, affecting any right or

privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education:

Power reserved to Parliament.

(3) In case any such Provincial Law, as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper Provincial Authority on that behalf then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section.

English and French languages to be used.

23. Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses: and either of those languages may be used by any person or in any pleading or Process, in or issuing from any Court of Canada established under the British North America Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

Interest allowed to the Province on a certain amount of the debt of Canada.

24. Inasmuch as the Province is not in debt, the said Province shall be entitled to be paid and to receive from the Government of Canada by half-yearly payments in advance, interest at the rate of five per centum per annum on the sum of four hundred and seventy-two thousand and ninety dollars.

Subsidy to the Province for support of Government, and in proportion to its population.

25. The sum of thirty thousand dollars shall be paid yearly by Canada to the Province, for the support of its Government and Legislature, and an annual grant in aid of the said Provinces shall be made, equal to eighty cents per head of the population estimated at seventeen thousand souls; and such grant of eighty cents per head shall be augmented in proportion to the increase of population, as may be shewn by the census that shall be taken thereof in the year one thousand one hundred and eighty-one, and by each subsequent decennial census, until its population amounts to four hundred thousand souls, at which amount such grant shall remain thereafter, and such sum shall be in full settlement of all future demands on Canada, and shall be paid half-yearly, in advance, to the said Province.

26. Canada will assume and defray the charges for the following services:— Canada assumes certain expenses.

1. Salary of the Lieutenant-Governor.

2. Salaries and allowances of the Judges of the Superior and District or County Courts.

3. Charges in respect of the Department of the Customs.

4. Postal Department.

5. Protection of Fisheries.

6. Militia.

7. Geographical Survey.

8. The Penitentiary.

9. And such further charges as may be incident to and connected with the services which, by the British North America Act, 1867, appertain to the General Government, and as are or may be allowed to the other Provinces. General provision.

27. The Customs duties now by law chargeable in Rupert's Land, shall be continued without increase for the period of three years from and after the passing of this Act, and the proceeds of such duties shall form part of the Consolidated Revenue Fund of Canada. Customs duties.

28. Such provisions of the Customs Laws of Canada (other than such as prescribe the rate of duties payable) as may be from time to time declared by the Governor-General in Council to apply to the Province of Manitoba shall be applicable thereto, and in force therein accordingly. Customs laws.

29. Such provisions of the Laws of Canada respecting the Inland Revenue, including those fixing the amount of duties, as may be from time to time declared by the Governor-General in Council applicable to the said province shall apply thereto, and be in force therein accordingly. Inland Revenue laws and duties.

30. All ungranted or waste lands in the Province shall be, from and after the date of the said transfer, vested in the Crown, and administered by the Government of Canada for the purposes of the Dominion, subject to, and except, and so far as the same may be affected by the conditions and stipulations contained in the agreement for the surrender of Rupert's Land by the Hudson's Bay Company to Her Majesty. Ungranted lands vested in the Crown for Dominion purposes.

31. And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to Provisions as to Indian title.

Grant for half-breeds.

appropriate a portion of such ungranted lands to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted that under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council shall from time to time determine.

Quieting titles.

32. For the quieting of titles, and assuring to the settlers in the Province the peaceable possession of the lands now held by them, it is enacted as follows:—

Grants by H. B. Company.

1. All grants of land in freehold made by the Hudson's Bay Company up to the eighth day of March in the year 1869, shall, if required by the owner, be confirmed by grant from the Crown.

The same.

2. All grants of estates less than freehold in land made by the Hudson's Bay Company, up to the 8th day of March aforesaid, shall if required by the owner, be converted into an estate in freehold by grant from the Crown.

Titles being occupancy with permission.

3. All titles by occupancy with the sanction and under the license and authority of the Hudson's Bay Company up to the eighth day of March aforesaid, of land in that part of the Province in which the Indian Title has been extinguished, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

By peaceable possession.

4. All persons in peaceable possession of tracts of land at the time of the transfer to Canada, in those parts of the Province in which the Indian title has not been extinguished, shall have the right of pre-emption of the same, on such terms and conditions as may be determined by the Governor in Council.

Lieutenant-Governor to make provisions under Order in Council.

5. The Lieutenant-Governor is hereby authorized under regulations to be made from time to time by the Governor General in Council to make all such provisions for ascertaining and adjusting, on fair and equitable terms, the rights of Common, and rights of cutting Hay held and enjoyed by the Settlers in the Province, and for the commutation of the same by grants of land from the Crown.

33. The Governor General in Council shall from time to time settle and appoint the mode and form of Grants of Land from the Crown and any Order in Council for that purpose when published in the Canada Gazette shall have the same force and effect as if it were a portion of this Act.

Governor in Council to appoint form, &c., of grants.

34. Nothing in this Act shall in any way prejudice or affect the rights or properties of the Hudson's Bay Company as contained in the conditions under which that Company surrendered Rupert's Land to her Majesty.

Rights of H. B. Company not affected.

35. And with respect to such portion of Rupert's Land and the North-Western Territory as is not included in the Province of Manitoba, it is hereby enacted that the Lieutenant-Governor of the said Province shall be appointed, by Commission under the Great Seal of Canada to be the Lieutenant-Governor of the same under the name of the North-West Territories and subject to the provisions of the Act in the next section mentioned.

Lieutenant-Governor to govern N.-W. Territory for Canada.

36. Except as hereinbefore is enacted and provided, the Act of the Parliament of Canada passed in the now last session thereof, and entitled "An Act for the Temporary Government of Rupert's Land and the North-Western Territory when united with Canada" is hereby re-enacted, extended and continued in force until the first day of January, 1871, and until the end of the Session of Parliament then next succeeding.

Act 32 and 33 V., c. 3, extended and continued.

ORDER OF HER MAJESTY IN COUNCIL ADMITTING RUPERT'S LAND AND THE NORTH-WESTERN TERRITORY INTO THE UNION.

At the Court at Windsor, the 23rd day of June, 1870.[76]

Present: The Queen's Most Excellent Majesty, Lord President, Lord Privy Seal, Lord Chamberlain and Mr. Gladstone.

Whereas by the British North America Act, 1867, "It was (amongst other things) enacted that it should be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Address from the Houses of the Parliament of Canada, to admit Rupert's Land and the North-Western Territory, or either of them, into the Union on such terms and conditions in each case as should be in the Addresses expressed, and as the Queen should think fit to approve, subject to the provisions of the said Act. And it was further enacted that the provisions of any Order in Council in that behalf should have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland:

And whereas by an Address from the Houses of the Parliament of Canada, of which Address a copy is contained in the Schedule to this Order annexed, marked A, Her Majesty was prayed, by and with the advice of Her Most Honourable Privy Council, to unite Rupert's Land and the North-Western Territory with the Dominion of Canada, and to grant to the Parliament of Canada authority to legislate for their future welfare and good government upon the terms and conditions therein stated:

And whereas by the "Rupert's Land Act, 1868," it was (among other things) enacted that it should be competent for the Governor and Company of Adventurers of England trading into Hudson's Bay (hereinafter called the Company) to surrender to Her Majesty, and for Her Majesty, by any Instrument under Her Sign Manual and Signet to accept a surrender of all or any of the lands, territories, rights, privileges, liberties, franchises, powers, and authorities whatsoever, granted or purported to be granted by certain Letters Patent therein recited to the said Company within Rupert's Land, upon such terms and conditions as should be agreed upon by and between Her Majesty and the said Company; provided however, that such surrender should not be accepted by Her Majesty until the terms and conditions upon which

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[76] Dominion Statutes 1872, pp. lxiii-lxvii.

Rupert's Land should be admitted into the said Dominion of Canada should have been approved of by Her Majesty and embodied in an Address to Her Majesty from both the Houses of the Parliament of Canada, in pursuance of the 146th Section of the British North America Act, 1867:

And it was by the same Act further enacted that it should be competent to Her Majesty, by Order or Orders in Council, on Addresses from the Houses of the Parliament of Canada, to declare that Rupert's Land should, from a date to be therein mentioned, be admitted into and become part of the Dominion of Canada:

And whereas a second address from both the Houses of the Parliament of Canada has been received by Her Majesty praying that Her Majesty will be pleased, under the provisions of the hereinbefore recited Acts, to unite Rupert's Land on the terms and conditions expressed in certain Resolutions therein referred to and approved of by Her Majesty of which said Resolutions and Addresses copies are contained in the Schedule to this Order annexed marked B, and also to unite the North-Western Territory with the Dominion of Canada as prayed for by and on the terms and conditions contained in the hereinbefore first recited Address, and also approved of by Her Majesty:

And whereas a draft surrender has been submitted to the Governor-General of Canada containing stipulations to the following effect, viz.:—

1. The sum of £300,000 (being the sum hereinafter mentioned) shall be paid by the Canadian Government into the Bank of England to the credit of the Company within six calendar months after acceptance of the surrender aforesaid, with interest on the said sum at the rate of 5 per cent. per annum, computed from the date of such acceptance until the time of such payment.

2. The size of the blocks which the Company are to select adjoining each of their forts in the Red River limits, shall be as follows:—

	Acres.
Upper Fort Garry and town of Winnipeg, including the enclosed park around shop and ground at the entrance of the town	500
Lower Fort Garry (including the farm the Company now have under cultivation)	500
White Horse Plain	500

3. The deduction to be made as hereinafter mentioned from the price of the materials of the Electric Telegraph, in respect of deterioration thereof, is to be certified within three calendar months from such acceptance as aforesaid by the agents of the Company in charge of the depots where the materials are stored. And the said price is to be paid by the Canadian Government into the Bank of England to the credit of the Company within six calendar months of such acceptance, with interest at the rate of five per cent. per annum on the amount of such price, computed from the date of such acceptance until the time of payment:

And whereas the said draft was on the fifth day of July, one thousand eight hundred and sixty-nine, approved by the said Governor-General in accordance with a Report from the Committee of the Queen's Privy Council for Canada; but it was not expedient that the said stipulations not being contained in the aforesaid second Address, should be included in the surrender by the said Company to Her Majesty of their rights aforesaid or in this Order in Council:

And whereas the said Company did by deed under the seal of the said Company and bearing date the nineteenth day of November, one thousand eight hundred and sixty-nine of which deed a copy is contained in the Schedule to this Order annexed marked C., surrender to Her Majesty all the rights of Government and other rights, privileges, liberties, franchises, powers, and authorities granted, or purported to be granted to the said Company by the aid Letters Patent herein and hereinbefore referred to, and also all similar rights which may have been exercised or assumed by the said Company in any parts of British North America not forming part of Rupert's Land, or of Canada or of British Columbia, and all the lands and territories (except and subject as in the terms and conditions therein mentioned) granted or purported to be granted to the said Company by the said Letters Patent:

And whereas such surrender has been duly accepted by Her Majesty, by an Instrument under Her Sign Manual and Signet, bearing date at Windsor the twenty-second day of June, one thousand eight hundred and seventy:

It is hereby Ordered and declared by Her Majesty, by and with the advice of the Privy Council, in pursuance and exercise of the powers vested in Her Majesty by the said Acts of Parliament, that from and after the fifteenth day of July, one thousand eight hundred and seventy, the said North-

Western Territory shall be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth in the first hereinbefore recited Address, and that the Parliament of Canada shall from the day aforesaid have full power and authority to legislate for the future welfare and good government of the said Territory. And it is further ordered that without prejudice to any obligations arising from the aforesaid approved Report, Rupert's Land shall from and after the said date be admitted into and become part of the Dominion of Canada upon the following terms and conditions, being the terms and conditions still remaining to be performed of those embodied in the said second address of the Parliament of Canada, and approved of by Her Majesty as aforesaid:—

1. Canada is to pay to the Company £300,000 when Rupert's Land is transferred to the Dominion of Canada.

2. The Company are to retain the posts they actually occupy in the North-Western Territory, and may, within twelve months of the surrender, select a block of land adjoining each of its posts within any part of British North America not comprised in Canada and British Columbia, in conformity, except as regards the Red River Territory, with a list made out by the Company and communicated to the Canadian Ministers, being the list in the Schedule of the aforesaid Deed of Surrender. The actual survey is to be proceeded with, with all convenient speed.

3. The size of each block is not to exceed (10) acres round Upper Fort Garry, (300) acres round Lower Fort Garry; in the rest of the Red River Territory a number of acres to be settled at once between the Governor in Council and the Company, but so that the aggregate extent of the blocks is not to exceed 50,000 acres.

4. So far as the configuration of the country admits, the blocks shall front the river or road by which means of access are provided, and shall be approximately in the shape of parallelograms, of which the frontage shall not be more than half the depth.

5. The Company, may for fifty years after the surrender, claim in any township or district within the Fertile Belt in which land is set out for settlement grants of land not exceeding one twentieth part of the land so set out. The blocks so granted to be determined by lot and the Company to pay a rateable share of the survey expenses, not exceeding eight cents Canadian an acre. The Company may defer the exercise of their right of claiming the proportion of each township for not more than ten years after it is set out; but their claim must be limited to an allotment from the lands remaining unsold at the time they declare their intention to make it.

6. For the purpose of the last Article, the Fertile Belt is to be bounded as follows:—On the south by the United States boundary; on the west by the Rocky Mountains; on the north by the northern branch of the Saskatchewan; on the east by Lake Winnipeg, the Lake of the Woods and the waters connecting them.

7. If any township shall be formed abutting on the north bank of the northern branch of the Saskatchewan River, the Company may take their one-twentieth of any such township, which for the purpose of this Article shall not extend more than five miles inland from the river, giving to the Canadian Dominion an equal quantity of the portion of lands coming to them of townships established on the southern bank.

8. In laying out any public roads, canals, etc., through any block of land reserved to the Company, the Canadian Government may take, without compensation, such land as is necessary for the purpose, not exceeding one twenty-fifth of the total acreage of the block; but if the Canadian Government require any land which is actually under cultivation or which has been built upon or which is necessary for giving the Company's servants access to any river or lake, or as a frontage to any river or lake, they shall pay to the Company the fair value of the same, and shall make compensation for any injury done to the Company or their servants.

9. It is understood that the whole of the land to be appropriated in the meaning of the last preceding clause shall be appropriated for public purposes.

10. All titles to land up to the eighth day of March, one thousand eight hundred and sixty-nine, conferred by the Company are to be confirmed.

11. The Company is to be at liberty to carry on its trade without hindrance in its corporate capacity, and no exceptional tax is to be placed on the Company's land, trade or servants nor any import duties on goods introduced by them previous to the surrender.

12. Canada is to take over the materials of the electric telegraph at cost price,—such price including transport, but not including interest for money and subject to a deduction for ascertained deterioration.

13. The Company's claim to land under agreements of Messrs Vankoughnet and Hopkins is to be withdrawn.

14. Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them.

15. The Governor in Council is authorized and empowered to arrange any details that may be necessary to carry out the above terms and conditions.

And the Right Honorable Earl Granville one of Her Majesty's principal Secretaries of State, is to give the necessary directions herein accordingly.

Schedule (not printed.)[77]

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[77] See R. S. C. 1906, Vol. 4, App. III, pp. 59-75.

ORDER OF HER MAJESTY IN COUNCIL ADMITTING BRITISH COLUMBIA INTO THE UNION.[78]

At the Court at Windsor, the 16th day of May, 1871.

Present: The Queen's Most Excellent Majesty, His Royal Highness, Prince Arthur, Lord Privy Seal, Earl Cowper, Earl of Kimberley, Lord Chamberlain, Mr. Secretary Cardwell, Mr. Ayrton.

Whereas by the "British North America Act, 1867," provision was made for the Union of the Provinces of Canada, Nova Scotia, and New Brunswick into the Dominion of Canada, and it was (amongst other things) enacted that it should be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and of the Legislature of the Colony of British Columbia, to admit that colony into the said Union on such terms and conditions as should be in the Addresses expressed, and as the Queen should think fit to approve, subject to the provisions of the said Act; And it was further enacted that the provisions of any Order in Council in that behalf should have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

And whereas by Addresses from the Houses of the Parliament of Canada, and from the Legislative Council of British Columbia respectively, of which Addresses copies are contained in the Schedule to this Order annexed, Her Majesty was prayed by and with the advice of Her Most Honourable Privy Council, under the one hundred and forty-sixth section of the hereinbefore recited Act, to admit British Columbia into the Dominion of Canada, on the terms and conditions set forth in the said Addresses:

And whereas Her Majesty has thought fit to approve of the said terms and conditions, it is hereby ordered and declared by her Majesty, by and with the advice of Her Privy Council in pursuance and exercise of the powers vested in Her Majesty by the said Act of Parliament that from and after the twentieth day of July, one thousand eight hundred and seventy-one the said colony of British Columbia shall be admitted into and become part of the Dominion of Canada, upon the terms and conditions as set forth in the hereinbefore recited Addresses. And, in accordance with the terms of the said Addresses relating to the Electoral Districts in British Columbia, for which the first election of members to serve in the House of Commons of the said Dominion shall take place, it is hereby further ordered and declared that such electoral districts shall be as follows:—"New Westminster District" and the "Coast District," as defined in a public notice issued from the Lands and Works Office in the said colony, on the 15th day of December, one thousand eight hundred and sixty-nine by the desire of the Governor and purporting to be in accordance with the provisions of the thirty-ninth clause of the "Mineral Ordinance 1869," shall constitute one district to be designated "New Westminster District," and return one Member.

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[78] Dominion Statutes 1872, pp. lxxxii-lxxxv.

"Cariboo District" and "Lillooet District," as specified in the said public notice, shall constitute one district to be designated "Cariboo District," and return one Member.

"Yale District" and "Kootenay District," as specified in the said public notice, shall constitute one District to be designated "Yale District," and return one Member.

Those proportions of Vancouver Island, known as "Victoria District," "Esquimalt District" and "Metchosin District," as defined in the official maps of those districts, which are in the Land Office, Victoria, and are designated respectively "Victoria District Official Map, 1858," "Esquimalt District Official Map, 1858," ond "Metchosin District Official Map, A.D. 1858," shall constitute one district to be designated "Victoria District," and return two Members.

All the remainder of Vancouver Island, and all such Islands adjacent thereto as were formerly dependencies of the late colony of Vancouver Island, shall constitute one District to be designated "Vancouver Island District," and return one Member.

And the Right Honourable Earl of Kimberley, one of Her Majesty's principal Secretaries of State, is to give the necessary directions therein accordingly.

ARTHUR HELPS.

Schedule (not printed.)[79]

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[79] See R. S. C. 1906, Vol. 4, App. III, pp. 78-85.

ORDER OF HER MAJESTY IN COUNCIL, ADMITTING PRINCE EDWARD ISLAND INTO THE UNION.[80]

At the Court at Windsor, the 26th day of June, 1873.

Present: The Queen's Most Excellent Majesty, Lord President, Eard Granville, Earl of Kimberley, Lord Chamberlain, Mr. Gladstone.

Whereas by the "British North America Act, 1867," provision was made for the Union of the Provinces of Canada, Nova Scotia and New Brunswick into the Dominion of Canada, and it was (among other things) enacted that it should be lawful for the Queen by and with the advice of Her Majesty's Most Honourable Privy Council, on addresses from the Houses of the Parliament of Canada, and of the Legislature of the Colony of Prince Edward Island, to admit that colony into the said Union on such terms and conditions as should be in the Addresses expressed, and as the Queen should think fit to approve, subject to the provisions of the said Act; and it was further enacted that the provisions of any Order in Council in that behalf, should have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

And whereas by Addresses from the Houses of the Parliament of Canada, and from the Legislative Council and House of Assembly of Prince Edward Island respectively, of which Addresses copies are contained in the Schedule to this Order annexed Her Majesty was prayed, by and with the advice of Her Most Honourable Privy Council, under the one hundred and forty-sixth Section of the hereinbefore recited Act, to admit Prince Edward Island into the Dominion of Canada, on the terms and conditions set forth in the said Addresses.

And whereas Her Majesty has thought fit to approve of the said terms and conditions, it is hereby ordered and declared by Her Majesty, by and with the advice of Her Privy Council, in pursuance and exercise of the powers vested in Her Majesty by the said Act of Parliament that from and after the first day of July, one thousand eight hundred and seventy-three, the said colony of Prince Edward Island shall be admitted into and become part of the Dominion of Canada, upon the terms and conditions set forth in the hereinbefore recited Addresses.

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[80] Dominion Statutes, 1873, pp. ix-xxiii.

And in accordance with the terms of the said Addresses relating to the Electoral Districts for which, the time within which, and the laws and provisions under which the first election of members to serve in the House of Commons of Canada for such Electoral Districts shall be held, it is hereby further ordered and declared that "Prince County" shall constitute one district, to be designated "Prince County District," and return two Members; that Queen's County shall constitute one District, to be designated "Queen's County District," and return two members; that King's County District shall constitute one district, to be designated "King's County District," and return two members; that the election of members to serve in the House of Commons of Canada for such Electoral Districts shall be held within three calendar months from the day of the administration of the said Island into the Union or Dominion of Canada; that all laws which at the date of this Order in Council relating to the qualifications of any person to be elected or sit to vote as a member of the House of Assembly of the said Island, and relating to the qualifications or disqualifications of voters, and to the oaths to be taken by voters and to Returning Officers and Poll Clerks and their powers and duties and relating to Polling Divisions within the said Island, and relating to the proceedings at elections and to the period during which such elections may be continued and relating to the trial of controverted elections, and the proceedings incidental thereto and relating to the vacating of seats of the members and to the executions of new writs, in case of any seat being vacated otherwise than by a dissolution, and to all other matters connected with or incidental to elections of members to serve in the House of Assembly of the said Island, shall apply to election of Members to serve in the House of Commons for the Electoral Districts situate in the said Island of Prince Edward.

And the Right Honorable Earl of Kimberley, one of Her Majesty's Principal Secretaries of State, is to give the necessary directions herein, accordingly.

ARTHUR HELPS.

Schedule (not printed.)[81]

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[81] See R. S. C. 1906, Vol. 4, App. III, pp. 88-94.

THE ALBERTA ACT.

4-5 Edward VII., Chapter 3.

An Act to establish and provide for the Government of the Province of Alberta.

[Assented to July 20th, 1905.]

Preamble.

Whereas in and by the British North America Act, 1871, being chapter 28 of the Acts of the Parliament of the United Kingdom passed in the session thereof held in the 34th and 35th years of the reign of her late Majesty Queen Victoria, it is enacted that the Parliament of Canada may from time to time establish new provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such province, and for the passing of laws for the peace, order, and good government of such province, and for its representation in the said Parliament of Canada;

And whereas it is expedient to establish as a province the territory hereinafter described, and to make provision for the government thereof, and the representation thereof, in the Parliament of Canada: Therefore, His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

Short title.

1. This Act may be cited as the Alberta Act.

Province of Alberta formed; its boundaries.

2. The territory comprised within the following boundaries, that is to say, commencing at the intersection of the international boundary dividing Canada from the United States of America by the fourth meridian in the system of Dominion lands surveys; thence westerly along the said international boundary to the eastern boundary of the Province of British Columbia; thence northerly along the said eastern boundary of the Province of British Columbia to the north east corner of the said province; thence easterly along the parallel of the sixtieth degree of north latitude to the fourth meridian in the system of Dominion lands surveys, as the same may be hereafter defined in accordance with the said system; thence southerly along the said fourth meridian to the point of commencement, is hereby established as a province of the Dominion of Canada, to be called and known as the Province of Alberta.

3. The provisions of the British North America Acts, 1867 to 1886, shall apply to the Province of Alberta in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if the said Province of Alberta had been one of the provinces originally united, except in so far as varied by this Act, and except such provisions as are in terms made, or by reasonable intendment may be held to be, specially applicable to or only to affect one or more and not the whole of the said provinces.

B. N. A. Acts 1867-1886, to apply.

4. The said province shall be represented in the Senate of Canada by four members; provided that such representation may, after the completion of the next decennial census, be from time to time increased to six by the Parliament of Canada.

Representation in the Senate.

5. The said province and the Province of Saskatchewan shall, until the termination of the Parliament of Canada, existing at the time of the first readjustment hereinafter provided for, continue to be represented in the House of Commons as provided by chapter 60 of the Statutes of 1903, each of the electoral districts defined in that part of the schedule to the said Act which relates to the North-west Territories, whether such district is wholly in one of the said provinces, or partly in one or partly in the other of them, being represented by one member.

Representation in the House of Commons.

6. Upon the completion of the next quinquennial census for the said province, the representation thereof shall forthwith be readjusted by the Parliament of Canada, in such manner that there shall be assigned to the said province such a number of members as will bear the same proportion to the number of its population ascertained at such quinquennial census as the number sixty-five bears to the number of the population of Quebec as ascertained at the then last quinquennial census; and in the computation of numbers of members for the said province a fractional part not exceeding one-half of the whole number requisite for entitling the province to a member shall

Re-adjustment after next quinquennial census.

be disregarded, and a fractional part exceeding one-half of that number shall be deemed equivalent to the whole number, and such readjustment shall take effect upon the termination of the parliament then existing.

Subsequent re-adjustments.

2. The representation of the said province shall thereafter be readjusted from time to time according to the provisions of section 51 of the British North America Act, 1867.

Election of members of House of Commons.

7. Until the Parliament of Canada otherwise provides the qualifications of voters for the election of members of the House of Commons and the proceedings at and in connection with elections of such members shall, *mutatis mutandis,* be those prescribed by law at the time this Act comes into force with respect to such elections in the North-west Territories.

Executive Council.

8. The Executive Council of the said province shall be composed of such persons, under such designations, as the Lieutenant Governor from time to time thinks fit.

Seat of Government.

9. Unless and until the Lieutenant Governor in Council of the said province otherwise directs by proclamation under the Great Seal, the seat of Government of the said province shall be at Edmonton.

Powers of Lieutenant-Governor and Council.

10. All powers, authorities, and functions which under any law were before the coming into force of this Act vested in or exercisable by the Lieutenant Governor of the North-west Territories, with the advice, or with the advice and consent of the Executive Council thereof, or in conjunction with that Council or with any member or members thereof, or by the said Lieutenant Governor individually shall, so far as they are capable of being exercised after the coming into force of this Act in relation to the government of the said province, be vested in and shall or may be exercised by the Lieutenant Governor of the said province, with the advice or with the advice and consent of, or in conjunction with the Executive Council of the said province, or any member or members thereof, or by the Lieutenant Governor individually, as the case requires, subject nevertheless to be abolished or altered by the Legislature of the said province.

Great Seal.

11. The Lieutenant Governor in Council shall, as soon as may be after this Act comes into force, adopt and provide a Great Seal of the said province, and may, from time to time, change such seal.

12. There shall be a legislature for the said province consisting of the Lieutenant Governor and one House to be styled the Legislative Assembly of Alberta. Legislature.

13. Until the said Legislature otherwise provides, the Legislative Assembly shall be composed of twenty-five members to be elected to represent the electoral divisions defined in the schedule to this Act. Legislative Assembly.

14. Until the said Legislature otherwise determines all the provisions of the law with regard to the constitution of the Legislative Assembly of the North-west Territories and the election of members thereof shall apply, *mutatis mutandis,* to the Legislative Assembly of the said province and the election of members thereof respectively. Election of members of Assembly.

15. The writs for the elections of the members of the first Legislative Assembly of the said province shall be issued by the Lieutenant Governor and made returnable within six months after this Act comes into force. Writs for first election.

16. All laws and all orders and regulations made thereunder, so far as they are not inconsistent with anything contained in this Act, or as to which this Act contains no provision intended as a substitute therefor, and all courts of civil and criminal jurisdiction and all commissions, powers, authorities, and functions, and all officers and functionaries, judicial, administrative, and ministerial, existing immediately before the coming into force of this Act in the territory hereby established as the province of Alberta, shall continue in the said province as if this Act and the Saskatchewan Act had not been passed; subject, nevertheless, except with respect to such as are enacted by or existing under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland to be repealed, abolished, or altered by the Parliament of Canada, or by the legislature of the said province, according to the authority of the Parliament or of the said Legislature Provided that all powers, authorities and functions which, under any law, order or regulation were, before the coming into force of this Act, vested in or exercisable by any public officer or functionary of the North-west Territories shall be vested in and exercisable in and for the said province by like public officers and functionaries of the said province when appointed by competent authority. Laws, Courts, and officers continued. Proviso.

Province may abolish Supreme Court of N. W. T.

Proviso.

2. The legislature of the province may, for all purposes affecting or extending to the said province, abolish the Supreme Court of the North-west Territories and the officers, both judicial and ministerial, thereof, and the jurisdiction, powers and authority belonging or incident to the said court: provided that, if, upon such abolition, the legislature constitutes a superior court of criminal jurisdiction, the procedure in criminal matters then obtaining in respect of the Supreme Court of the North-west Territories shall, until otherwise provided by competent authority, continue to apply to such superior court, and that the Governor in Council may at any time and from time to time declare all or any part of such procedure to be inapplicable to such superior court.

As to certain corporations in N. W. T.

3. All societies or associations incorporated by or under the authority of the legislature of the North-west Territories existing at the time of the coming into force of this Act which include within their objects the regulation of the practice or the right to practice any profession or trade in the North-west Territories, such as the legal or the medical profession, dentistry, pharmaceutical chemistry and the like, shall continue, subject, however, to be dissolved and abolished by order of the Governor in Council, and each of such societies shall have power to arrange for and effect the payment of its debts and liabilities and the division, disposition or transfer of its property.

As to Joint-stock Companies.

4. Every joint-stock company lawfully incorporated by or under the authority of any ordinance of the North-west Territories shall be subject to the legislative authority of the province of Alberta if—

(a) The head office or the registered office of such company is at the time of the coming into force of this Act situate in the province of Alberta; and

(b) The powers and objects of this company are such as might be conferred by the Legislature of the said province and not expressly authorized to be executed in any part of the North-west Territories beyond the limits of the said province.

Education.

17. Section 93 of the British North America Act, 1867, shall apply to the said province, with the substitution of paragraph (1) of the said section 93 of the following paragraph:—

" (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinance of the North-west Territories passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said Ordinances."

2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29 or any Act passed in amendment thereof, or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

3. Where the expression "by law" is employed in paragraph 3 of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30, and where the expression "at the union" is employed, in the said paragraph 3, it shall be held to mean the date at which this Act comes into force.

18. The following amounts shall be allowed as an annual subsidy to the province of Alberta and shall be paid by the Government of Canada, by half-yearly instalments in advance, to the said province, that is to say:— **Subsidy to province.**

(a) for the support of the Government and Legislature, fifty thousand dollars; **For Government.**

(b) On an estimated population of two hundred and fifty thousand, at eighty cents per head, two hundred thousand dollars subject to be increased as hereinafter mentioned, that is to say: a census of the said province shall be taken in every fifth year, reckoning from the general census of one thousand nine hundred and one, and an approximate estimate of the population shall be made at equal intervals of time between each quinquennial and decennial census; and whenever the population by any such census or estimate exceeds two hundred and fifty thousand, which shall be the minimum on which the said allowance shall be calculated, the amount of the said allowance shall be increased accordingly and so on until the population has reached eight hundred thousand souls. **In proportion to population.**

19. Inasmuch as the said province is not in debt, it shall be entitled to be paid and to receive from the Government of Canada by half-yearly payments in advance an annual sum of four hundred and five thousand three hundred and **Annual payment to province.**

seventy-five dollars, being the equivalent of interest at the rate of five per cent. per annum on the sum of eight million one hundred and seven thousand five hundred dollars.

Compensation to province for public lands.

20. Inasmuch as the said province will not have the public land as a source of revenue, there shall be paid by Canada to the province by half-yearly payments in advance an annual sum based upon the population of the province as from time to time ascertained by the quinquennial census thereof, as follows:—

The population of the said province being assumed to be at present two hundred and fifty thousand the sum payable until such population reaches four hundred thousand shall be three hundred and seventy-five thousand dollars;

Thereafter until such population reaches eight hundred thousand, the sum payable shall be five hundred and sixty-two thousand five hundred dollars;

Thereafter until such population reaches one million two hundred thousand the sum payable shall be seven hundred and fifty thousand dollars.

And thereafter the sum payable shall be one million one hundred and twenty-five thousand dollars.

Further compensation.

2. As an additional allowance in lieu of public lands, there shall be paid by Canada to the province annually by half-yearly payments, in advance, for five years, from the time this Act comes into force, to provide for the construction of necessary public buildings, the sum of ninety-three thousand seven hundred and fifty dollars.

Property in lands, etc.

21. All Crown lands, mines and minerals, and royalties incident thereto, and the interest of the Crown in the waters within the province under the North-west Irrigation Act, 1898, shall continue to be vested in the Crown and administered by the Government of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, which shall apply to the said province with the substitution therein of the said province for the North-west Territories.

Division of assets and liabilities between Saskatchewan and Alberta.

22. All properties and assets of the North-west Territories shall be divided equally between the said province and the province of Saskatchewan, and the two provinces shall be jointly and equally responsible for all debts and liabilities of the North-west Territories: provided that, if any difference arises as to the division and adjustment of such properties, assets, debts, and liabilities, such difference shall be referred to the arbitrament of three arbitrators one of whom shall be chosen by the Lieutenant Governor in Council of each province, and the third by the Governor in Council. The selection of such arbitrators shall not be made until the Legislatures of the provinces have met, and the arbitrator chosen by Canada shall not be resident of either province. **Arbitration.**

23. Nothing in this Act shall in any way prejudice or affect the rights or properties of the Hudson's Bay Company as contained in the conditions under which that Company surrendered Rupert's Land to the Crown. **Rights of H. B. Co.**

24. The powers hereby granted to the said province shall be exercised subject to the provisions of section 16 of the contract set forth in the schedule to chapter 1 of the statutes of 1881, being an Act respecting the Canadian Pacific Railway Company. **Provision as to C. P. R. Co.**

25. This Act shall come into force on the first day of September, one thousand nine hundred and five. **Commencement of Act.**

Schedule (not printed.)

THE NORTH-WEST TERRITORIES.

4-5 EDWARD VII., CHAPTER 27.

An Act to amend the Act respecting the North-west Territories.

[Assented to July 20th, 1905.]

His Majesty by and with the advice and consent of the Senate and the House of Commons of Canada, enacts as follows:—

Short title.

1. This Act may be cited as The North-west Territories Amendment Act, 1905.

Definition.

2. The expression "the said Act" in this Act shall mean The North-west Territories Act and all amendments thereto.

Territories Defined.

3. The North-west Territories shall hereafter comprise the territories formerly known as Rupert's Land and the North-western Territory, except such portions thereof as form the provinces of Manitoba, Saskatchewan and Alberta, the District of Keewatin and the Yukon Territory, together with all British Territories and possessions in North America and all islands adjacent to any such territories and possessions except the colony of Newfoundland and its dependencies.

Commissioner.

4. The Governor in Council may appoint for the territories a chief executive officer to be styled and known as the Commissioner of the North-West Territories; and the executive powers vested by the said Act in the Lieutenant Governor of the North-West Territories or in the Lieutenant Governor in Council shall be exercised by the Commissioner; and the Commissioner shall administer the government of the territories under instructions from time to time given him by the Governor in Council or the Minister of the Interior.

Council.

5. The Governor in Council may from time to time constitute and appoint such and so many persons not exceeding four in number as are deemed desirable to be a Council to aid the Commissioner in the administration of the territories; and a majority of the Council includng the Commissioner shall form a quorum.

6. The Commissioner in Council shall have the same powers to make ordinances for the government of the Territories as are by the said Act vested in the Legislative Assembly of the territories in relation to such subjects heretofore within the legislative authority of the said Assembly as are from time to time designated by the Governor in Council.

Ordinances by Commissioner in Council.

7. A copy of every such ordinance shall be transmitted to the Governor in Council within ten days after the passing thereof and shall be laid before both Houses of Parliament as soon as conveniently may be thereafter; and any such ordinance or any provision thereof may be disallowed by the Governor in Council at any time within two years after its passage.

Disallowance of Ordinances.

8. The Supreme Court of the North-West Territories is hereby disestablished in the territories but the Governor in Council may appoint such number of persons as stipendiary magistrates from time to time as may be deemed expedient, who shall have and exercise the powers, authorities, and functions by the said Act, vested in a judge of the said Court: Provided, that when any person is convicted of a capital offence and sentenced to death the magistrate shall forward to the Minister of Justice full notes of the evidence with his report upon the case, and the execution shall be stayed until such report is received and the pleasure of the Governor General thereon is communicated to the Commissioner.

Supreme Court disestablished. Stipendiary magistrates.

Sentence of death to be reported.

Stay of execution.

9. The Governor in Council may vest in any judge of any Court of any province the power of hearing and determining, either in the first instance or on appeal, any civil or criminal proceeding arising within the territories, and, in case of appeal, may prescribe the procedure in respect thereof.

Trial by judge of provincial Court.

10. Where in the opinion of a coroner it is impracticable to obtain six jurors he may hold an inquest with a jury of a less number or without a jury and in such case the inquisition shall state that the inquest has been so held with the reason therefor; and the verdict of the jury, if less than six in number shall be unanimous; and if there is no jury the coroner may find such verdict as a jury might have found.

Coroners.

11. A holograph will written and signed by the testator himself though not witnessed shall be valid.

Wills.

Prohibition of intoxicants.

12. Every ship, vessel or boat on which any intoxicating liquor or intoxicant is imported or conveyed into or through or over any portion of the territories contrary to the provisions of the said Act shall be forfeited to His Majesty and may be seized and dealt with accordingly.

Provision when there are no such officers, etc., as are designated by law.

13. Whenever in the said Act or in any other Act of the Parliament of Canada, or in any Ordinance of the territories any officer is designated for performing any duty therein mentioned and there is no such officer in the territories, the Commissioner may order by what other person or officer such duty shall be performed, and anything done by any such person or officer under such order shall be valid and lawful in the premises; or if it is in any such Act or Ordinance ordered that any document or thing be transmitted to any officer, Court, territorial division or place, and there is then in the territories no such officer, Court, territorial division or place, the Commissioner may order to what officer, Court, territorial division or place such transmission shall be made, or may dispense with the transmission thereof.

Provisional liquidator for N. W. T.

14. In view of the establishment of the provinces of Saskatchewan and Alberta by Acts of the present Session, the Governor in Council may appoint a liquidator whose duty it shall be, under the instructions and in accordance with the directions of the Governor in Council: (a) to take possession of the properties and assets of the Government of the North-West Territories; (b) to wind up the affairs of the said Government; (c) to liquidate the liabilities of the said Government out of and to the extent of any moneys coming into his possession by virtue of his office; and (d) to distribute the balance of such moneys and other assets including official records and documents between or among the Governments of the provinces of Saskatchewan and Alberta and the Government of Canada.

His duties.

His salary.

2. The salary and allowances of the liquidator may be paid in the first instance out of any unappropriated moneys forming part of the Consolidated Revenue Fund of Canada, but shall be a charge upon the properties and assets of the Government of the North-West Territories which come into his possession by virtue of his office.

Commencement of Act.

15. This Act shall come into force on the first day of September, one thousand nine hundred and five.

THE SASKATCHEWAN ACT.

4-5 EDWARD VII., CHAPTER 42.

An Act to establish and provide for the government of the province of Saskatchewan.

[Assented to July 20th, 1905.]

Preamble.

Whereas in and by the British North America Act, 1871, being chapter 28 of the Acts of the Parliament of the United Kingdom passed in the session thereof held in the 34th and 35th years of the reign of her late Majesty Queen Victoria, it is enacted that the Parliament of Canada may from time to time establish new provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any province thereof, and may, at the time of such establishment make provision for the constitution and administration of any such province and for the passing of laws for the peace, order, and good government of such province, and for its representation in the said Parliament of Canada;

And whereas it is expedient to establish as a province the territory hereinafter described, and to make provision for the government thereof and the representation thereof in the Parliament of Canada.

Therefore His Majesty, by and with the advice and consent to the Senate and House of Commons of Canada, enacts as follows:—

Short title.

1. This Act may be cited as The Saskatchewan Act.

Province of Saskatchewan formed; its boundaries.

2. The territory comprised within the following boundaries, that is to say,—commencing at the intersection of the international boundary dividing Canada from the United States of America by the west boundary of the Province of Manitoba; thence northerly along the said west boundary of the province of Manitoba to the north-west corner of the said province of Manitoba; thence continuing northerly along the centre of the road allowance between the twenty-ninth and thirtieth ranges west of the principal meridian in the system of Dominion lands surveys as the said road allowance may hereafter be defined in accordance with the said system, to the second meridian in the said system of Dominion lands surveys, as the same may hereafter be defined in accordance with the said system; thence northerly along the said second meridian to the sixtieth degree of north latitude; thence westerly along the parallel of the sixtieth degree of north latitude to the fourth meridian in the said system of Dominion lands surveys as the same may hereafter be defined in accordance with the said system; thence southerly along the said fourth meridian to the said international boundary dividing Canada from the United States of America; thence easterly along the said international boundary to the point of commencement,—is hereby established as a province of the Dominion of Canada, to be called and known as the province of Saskatchewan.

B. N. A. Acts, 1867-1886 to apply.

3. The provisions of the British North America Acts, 1867 to 1886, shall apply to the province of Saskatchewan in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion as if the said province of Saskatchewan had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment may be held to be, specially applicable to or only to affect one or more and not the whole of the said provinces.

Representation in the Senate.

4. The said province shall be represented in the Senate of Canada by four members; provided that such representation may, after the completion of the next decennial census, be from time to time increased to six by the Parliament of Canada.

Representation in the House of Commons.

5. The said province and the province of Alberta shall, until the termination of the Parliament of Canada existing at the time of the first readjustment hereinafter provided for continue to be represented in the House of Commons as provided by chapter 60 of the statutes of 1903 each of the electoral districts defined in that part of the schedule to the said Act which relates to the North-West Territories whether such district is wholly in one of the said provinces, or partly in one and partly in the other of them, being represented by one member.

Readjustment after

6. Upon the completion of the next quinquennial census for the said province, the representation thereof shall forthwith be readjusted by the Parliament of Canada in such manner that there shall be assigned to the said province such a number of members as will bear the same proportion to the number of its population ascertained at such quinquennial census as the number sixty-five bears to the number of the population of Quebec as ascertained at the then last decennial census; and in the computation of the number of members for the said province a fractional part not exceeding one-half of the whole number requisite for entitling the province to a member shall be disregarded and a fractional part exceeding one-half of that number shall be deemed equivalent to the whole number, and such readjustment shall take effect upon the termination of the Parliament then existing. **next quinquennial census.**

2. The representation of the said province shall thereafter be readjusted from time to time according to the provisions of section 51 of the British North America Act, 1867. **Subsequent readjustments.**

7. Until the Parliament of Canada otherwise provides the qualifications of voters for the election of members for the House of Commons and the proceedings at and in connection with elections of such members shall, *mutatis mutandis*, be those prescribed by law at the time this Act comes into force with respect to such elections in the North-West Territories. **Election of members of House of Commons.**

8. The Executive Council of the said province shall be composed of such persons under such designations as the Lieutenant-Governor from time to time thinks fit. **Executive Council.**

9. Unless and until the Lieutenant Governor in Council of the said province otherwise directs by proclamation under the Great Seal, the seat of government of the said province shall be at Regina. **Seat of Government.**

10. All powers, authorities and functions which under any law were before the coming into force of this Act vested in or exercisable by the Lieutenant Governor of the North-West Territories, with the advice or with the advice and consent of the Executive Council thereof, or in conjunction with that Council or with any member or members thereof or by the said Lieutenant Governor individually shall, so far as they are capable of being exercised after the coming into force of this Act in relation to the government of the said province, be vested in and shall or may be exercised by the Lieutenant Governor of the said province, with the advice or with the advice and con- **Powers of Lieutenant Governor and Council.**

sent of, or in conjunction with the Executive Council of the said province or any member or members thereof, or by the Lieutenant Governor individually, as the case requires, subject nevertheless to be abolished or altered by the legislature of the said province.

Great Seal.

11. The Lieutenant Governor in Council shall, as soon as may be after this Act comes into force, adopt and provide a Great Seal of the said province, and may, from time to time, change such seal.

Legislature.

12. There shall be a Legislature for the said province consisting of the Lieutenant Governor and one House, to be styled the Legislative Assembly of Saskatchewan.

Legislative Assembly.

13. Until the said Legislature otherwise provides, the Legislative Assembly shall be composed of twenty-five members to be elected to represent the electoral divisions defined in the schedule to this Act.

Election of members of Assembly.

14. Until the said Legislature otherwise determines all the provisions of the law with regard to the constitution of the Legislative Assembly of the North-West Territories and the election of members thereof shall apply *mutatis mutandis* to the Legislative Assembly of the said province and the election of members thereof respectively.

Writs for first election.

15. The writs for the election of the members of the first Legislative Assembly of the said province shall be issued by the Lieutenant Governor and made returnable within six months after this Act comes into force.

Laws, Courts and officers continued.

16. All laws and all orders and regulations made thereunder so far as they are not inconsistent with anything contained in this Act or as to which this Act contains no provision intended as a substitute therefor, and all Courts of civil and criminal jurisdiction, and all commissions, powers, authorities, and functions, and all officers and functionaries, judicial, administrative and ministerial, existing immediately before the coming into force of this Act in the territory hereby established as the province of Saskatchewan, shall continue in the said province as if this Act and (the Alberta Act) had not been passed; subject, nevertheless, except with respect to such as are enacted by or existing under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland, to be repealed, abolished or altered, by the Parliament of Canada or by the Legislature of the said province, according to the authority of the Parliament or of the said Legislature: Provided that all powers, authorities, and functions which under any law, order or regulation, were, before the coming into force of this Act, vested in or exercisable by any public officer or functionary of the North-West Territories shall be vested in and exercisable in and for the said province by like public officers and functionaries of the said province when appointed by competent authority. **Proviso.**

2. The Legislature of the province may, for all purposes affecting or extending to the said province abolish the Supreme Court of the North-West Territories, and the offices, both judicial and ministerial thereof, and the jurisdiction, powers and authorities belonging to or incident to the said Court: Provided that, if upon such abolition, the Legislature constitutes a Superior Court of criminal jurisdiction the procedure in criminal matters then obtaining in respect of the Supreme Court of the North-West Territories shall, until otherwise provided for by competent authority, continue to apply to such Superior Court, and that the Governor in Council may at any time and from time to time declare all or any part of such procedure to be inapplicable to such Superior Court. **Province may abolish Supreme Court of N. W. T.** **Proviso.**

3. All societies or associations incorporated by or under the authority of the Legislature of the North-West Territories existing at the time of the coming into force of this Act which include within their objects the regulations of the practice of, or the right to practice, any profession or trade in the North-West Territories such as the legal or the medical profession, dentistry, pharmaceutical chemistry, and the like, shall continue, subject however, to be dissolved and abolished by order of the Governor in Council, and each of such societies shall have power to arrange for and effect the payment of its debts and liabilities, and the division, disposition or transfer of its property. **As to certain corporations in N. W. T.**

4. Every joint-stock company lawfully incorporated by or under the authority of any Ordinance of the North-West Territories shall be subject to the legislative authority of the province of Saskatchewan if:— **As to joint-stock companies.**

(a) The head office or the registered office of such company is at the time of the coming into force of this Act situate in the province of Saskatchewan; and

(b) The powers and objects of such company are such as might be conferred by the Legislature of the said province and not expressly authorized to be executed in any part of the North-West Territories beyond the limits of the said province.

Education.

17. Section 93 of the British North America Act, 1867, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph:—

"(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-West Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said Ordinances."

2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29, or any Act passed in amendment thereof or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

3. Where the expression "by law" is employed in paragraph (3) of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30; and where the expression "at the Union" is employed, in the said paragraph (3), it shall be held to mean the date at which this Act comes into force.

Subsidy to province.

18. The following amounts shall be allowed as an annual subsidy to the province of Saskatchewan, and shall be paid by the Government of Canada by half-yearly instalments in advance, to the said province, that is to say:—

For Government.

(a) For the support of the Government and Legislature, fifty thousand dollars;

In proportion of population.

(b) On an estimated population of two hundred and fifty thousand, at eighty cents per head, two hundred thousand dollars, subject to be increased as hereinafter mentioned, that is to say:—A census of the said province shall be taken in every fifth year reckoning from the general census of one thousand nine hundred and one, and an approximate estimate of the population shall be made at equal intervals of time between each quinquennial and decennial census; and whenever the population, by any such census or estimate exceeds two hundred and fifty thousand, which shall be the minimum on which the said allowance shall be calculated, the amount of the said allowance shall be increased accordingly, and so on until the population has reached eight hundred thousand souls.

Annual payment to province.

19. Inasmuch as the said province is not in debt, it shall be entitled to be paid and to receive from the Government of Canada, by half-yearly payments in advance, an annual sum of four hundred and five thousand three hundred and seventy-five dollars, being the equivalent of interest at the rate of five per cent. per annum on the sum of eight million one hundred and seven thousand five hundred dollars.

Compensation to province for public lands.

20. Inasmuch as the said province will not have the public land as a source of revenue, there shall be paid by Canada to the province by half-yearly payments in advance, an annual sum based upon the population of the province as from time to time ascertained by the quinquennial census thereof, as follows:—

The population of the said province being assumed to be at present two hundred and fifty thousand, the sum payable until such population reaches four hundred thousand, shall be three hundred and seventy-five thousand dollars;

Thereafter, until such population reaches eight hundred thousand, the sum payable shall be five hundred and sixty-two thousand five hundred dollars;

Thereafter until such population reaches one million two hundred thousand, the sum payable shall be seven hundred and fifty thousand dollars;

And thereafter the sum payable shall be one million one hundred and twenty-five thousand dollars.

Further compensation.

2. As an additional allowance in lieu of public lands, there shall be paid by Canada to the province annually by half-yearly payments, in advance, for five years from the time this Act comes into force, to provide for the construction of necessary public buildings, the sum of ninety-three thousand even hundred and fifty dollars.

Property in lands, etc.

21. All Crown lands, mines and minerals and royalties incident thereto, and the interest of the Crown in the waters, within the province under *The North-West Irrigation Act,* 1898, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, which shall apply to the said province with the substitution therein of the said province for the North-West Territories.

Division of assets and liabilities between Alberta and Saskatchewan.

22. All properties and assets of the North-West Territories shall be divided equally between the said province and the province of Alberta, and the two provinces shall be jointly and equally responsible for all debts and liabilities of the North-West Territories: Provided that, if any difference arises as to the division and adjustment of such properties, assets, debts, and liabilities, such difference shall be referred to the arbitrament of three arbitrators, one of whom shall be chosen by the Lieutenant Governor in Council of each province, and the third by the Governor in Council. The selection of such arbitrators shall not be made until the Legislatures of the provinces have met, and the arbitrator chosen by Canada shall not be a resident of either province.

Arbitration.

Rights of H. B. Co.

23. Nothing in this Act shall in any way prejudice or affect the rights or properties of the Hudson's Bay Company as contained in the conditions under which that Company surrendered Rupert's Land to the Crown.

Provision as to C. P. R. Co.

24. The powers hereby granted to the said province shall be exercised subject to the provisions of section 16 of the contract set forth in the schedule to chapter 1 of the statutes of 1881, being an Act respecting the Canadian Pacific Railway Company.

Commencement of Act.

25. This Act shall come into force on the first day of September, one thousand nine hundred and five.

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